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Supreme Court, U.S.
FILED

No. 99 298 AUG 2 1999

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In The

SUPREME COURT OF THE UNITED STATES

JEFF BRYANT,

Petitioner,

v.

GOLDEN FLAKE SNACK FOODS, INC. and LIBERTY MUTUAL INSURANCE CO.

Respondents

and

WILLIAM GUNTER,

Petitioner,

v.

CITY OF BELLEVIEW and FLORIDA LEAGUE OF CITIES,

Respondents

On Petition for Writ of Certiorari To
The District Court of Appeal, First District
State of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the restriction of admissible medical testimony to physicians approved by the adverse party or approved by the administrative judge so restricts the medical evidence available to an injured worker under Florida's Workers Compensation Statute as to violate the due process and equal protection clauses of the Fourteenth Amendment to the U. S. Constitution, and the redress of grievances clause of the First Amendment to the U. S. Constitution?

2. Whether the unfettered discretion of the Governor to appoint and dismiss administrative judges under Florida's Workers Compensation Law denies the injured worker an independent adjudicator in violation of the due process and equal protection clauses of the Fourteenth Amendment to the U. S. Constitution, and the redress of grievances clause of the First Amendment to the U. S. Constitution?

3. Whether the systematic reduction in available benefits for injured workers has rendered Florida's Workers Compensation Law an illusory substitute for the constitutional rights of access to courts in violation of the First and Fourteenth Amendments to the U. S. Constitution?

LIST OF PARTIES

The names of all parties appear in the caption on the cover page.

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OPINIONS BELOW

As to Petitioner Bryant, the Order of the Judge of Compensation Claims, Jonathan D. Ohlman, dated March 10, 1998, is unpublished, and appears at Appendix A.

On appeal to the First District Court of Appeal for the State of Florida, a per curiam decision rendered on April 1, 1999, is unpublished, but reported at 732 So.2d 1071. That opinion appears at Appendix B. The denial of rehearing, dated May 3, 1999, also unpublished, appears at Appendix C.

As to Petitioner Gunter, the Order of the Judge of Compensation Claims, Jonathan D. Ohlman, dated March 5, 1998, is unpublished, and excerpts appear at Appendix D.

On appeal to the First District Court of Appeal for the State of Florida, a per curiam decision rendered on April 12, 1999, is unpublished, but reported at 732 So. 2d.1073. That opinion appears at Appendix E. The denial of rehearing, dated May 4, 1999, also unpublished, appears at Appendix F.

BASIS OF JURISDICTION

As to Petitioner Bryant, the Order of the First District Court of Appeal, State of Florida, denying rehearing is dated May 3, 1999.

As to Petitioner Gunter, the Order of the First District Court of Appeal, State of Florida, denying rehearing is dated May 4, 1999.

Pursuant to the revision of the Florida Constitution in 1980, the Florida Supreme Court no longer has jurisdiction for common law certiorari. Article V, § 3, Fla. Const.(1980). Accordingly, the First District Court of Appeal constitutes

the highest state court in which a determination can be obtained.

Petitioners assert jurisdiction under 28 U.S.C. § 1257 in that Petitioner's federal constitutional rights were necessarily adjudicated in the decisions below.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following provisions of the United States Constitution:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office. (Article III, § 1, U. S. Const.)
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (Amend. I, U. S. Const.)
>
> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Amend. XIV, § 1, U.S. Const.)

There are references to the following provisions of the Florida Constitution:

> All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty,.... (Art. I, § 2, Fla. Const.)
>
> No person shall be deprived of life, liberty or property without due process of law, ... (Art. I, § 9, Fla. Const.)
>
> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay. (Art. I, § 21, Fla. Const.)
>
> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein. (Art. II, § 3, Fla. Const.)

The following federal statute is the basis of jurisdiction for the filing of the Petition herein:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or

> the treaties or statutes of, or any commission held or authority exercised under, the United States. [28 U.S.C. § 1257(a)]

The Florida Statutes involved in this case are lengthy and are therefore reproduced in the Appendix. They are:

§ 440.02(21), Fla. Stat. (1989)

§ 440.02(27), Fla. Stat. (1998 Supp.)

§ 440.13(1)(j), Fla. Stat. (1994 Supp.)

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§ 440.45, Fla. Stat. (1994 Supp.)

§ 440.45, Fla. Stat. (1998 Supp.)

STATEMENT OF THE CASE

The issues raised by both Petitioners are identical and are presented in this joint petition under this Court's Rule 12.4.

Petitioner Bryant sought benefits for an on-the –job injury and accordingly filed a claim for benefits under Florida's workers' compensation system, and ultimately had a hearing on September 9, 1997, before the Hon. Jonathan Ohlman, Judge of Compensation Claims. Petitioner sought to introduce medical testimony of doctors who had not been authorized pursuant to § 440.13 (5)(e), Florida Statutes (1994 Supp.) and that testimony was not allowed. Petitioner's counsel contended at that point that § 440.13 (5)(e) was unconstitutional, but the Judge of Compensation Claims noted that he did not have the authority to rule on the constitutionality of the statute, so the testimony was not allowed and Petitioner was denied benefits. (Appendix A-2)

On appeal to the First District Court of Appeal for the State of Florida, Petitioner contended that § 440.13(5)(e) was unconstitutional in that it denied him access to the courts as provided in Art. I, § 21 of the Florida Constitution, denied him due process pursuant to Art. I, § 9 of the Florida Constitution, and denied him equal protection of the laws pursuant to Art. I, § 2 of the Florida Constitution. (Appendix G).

Petitioner also contended on appeal, but not before the Judge of Compensation Claims, that § 440.15, Florida

Statutes (1994 Supp.) dealing with benefits available under workers compensation, also violated Article I, § 2 and Article I, § 9 of the Florida Constitution. Moreover, Petitioner also asserted that § 440.45, Florida Statutes (1994 Supp.) which gave the power of appointment of Judges of Compensation Claims to the Governor, constituted a violation of the separation of powers of Art. II, § 3 , and of the due process provisions of Art. I, § 9, Florida Constitution.

On appeal to Florida's First District Court of Appeal, the Order of the Judge of Compensation Claims was per curiam affirmed without written opinion (Appendix B) and Petitioner's Motion for Rehearing was denied on May 3, 1999. (Appendix C)

Petitioner Gunter likewise filed a claim for benefits under Florida's workers compensation system and ultimately had a hearing on October 23, 1997, before the Hon. Jonathan Ohlman, Judge of Compensation Claims. Petitioner had filed a claim for a psychiatric independent medical examination(IME) but did not bring before the judge a motion to have that done. When the Petitioner offered the testimony of the psychiatrist, on the basis of § 440.13(5)(e), Fla. Stat. (1994 Supp.) the testimony was not allowed. (Appendix D-2)

On appeal to the First District Court of Appeal for the State of Florida, Petitioner contended that § 440.13(5)(e) was unconstitutional because it denied him access to the courts pursuant to Article I, § 21 of the Florida Constitution, denied him due process pursuant to Article I, § 9 of the Florida Constitution, and denied him equal protection of the laws pursuant to Article I, § 2 of the Florida Constitution. (Appendix H)

Petitioner Gunter likewise on appeal, but not before the Judge of Compensation Claims, contended that § 440.15, Florida Statutes (1994 Supp.) as to benefits available under workers compensation, also violated Article I, § 2 and Article I, § 9 of the Florida Constitution. Moreover,

Petitioner also asserted that § 440.45, Florida Statutes (1994 Supp.) giving the power of appointment of Judges of Compensation Claims to the Governor, was a violation of the separation of powers of Article II, § 3, and of Article I, § 9, of the Florida Constitution..

The First District Court of Appeal issued a per curiam affirmance without opinion (Appendix E) and rehearing was denied on May 4, 1999. (Appendix F).

This Petition for Certiorari is timely filed to seek review of federal constitutional issues which were inextricably intertwined and therfore necessarily adjudicated by the state court below, pursuant to District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

REASONS FOR GRANTING THE PETITION

This case addresses the constitutional rights of injured workers who have had their access to courts for civil remedies extinguished by workers compensation statutes. Generally, the substitute of the statutory remedy for the common law remedy has been approved by the courts. See, Mclean v. Mundy, 81 So.2d 501 (Fla. 1955)

Recent amendments to Florida's Workers Compensation law have: (1) restricted admissibility of medical evidence available to the injured worker; (2) reduced the independence of the administrative law judges; (3) reduced available wage-loss benefits by more than 95% of what was available a mere ten years ago. Thus, this case presents the question whether the statutory remedy is no longer an adequate remedy to be substituted for the workers' rights to redress in court. The statutory remedy has become so restricted that it runs afoul of the fundamental rights of redress of grievances, due process of law and equal protection of the law.

This Court has held in City of Cleburne v. Cleburne Living Center , 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d

313(1985) that "..the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." (105 S.Ct. 3249, 3254) But the Court went on to say in Cleburne that the general rule is changed where the classification interferes with a fundamental right, and that an equal protection analysis requiring strict scrutiny is substituted for that general rule. Id., 105 S.Ct. 3249, 3255

THE RESTRICTION OF MEDICAL TESTIMONY:

Sections 440.13(1)(j), 440.13(2)(c), 440.13(3)(a), 440.13(5)(a), 440.13(5)(e) and 440.13(5)(f), Florida Statutes (1994 Supp.) are set out in Appendix J.

Section 440.13(5)(e) restricts medical testimony to three classes: (a) a medical advisor appointed by the judge; (b) an independent medical examiner(IME); or (c) a physician authorized by the insurance carrier. (Appendix J-3). Thus, the only medical witness which can be selected by the injured worker is the IME. Sections 440.13(1)(j) and 440.13(5)(a) give the illusion that either party (the injured worker or the insurance carrier) can select an IME physician. (Appendix, J-1, J-2) The reality, however, is that only the insurance carrier actually pays physicians (§ 440.13(2)(c), (Appendix, J-1)and no sensible physician will examine a workers compensation patient without prior approval from the insurance carrier. (§ 440.13(3)(a), Appendix , J-2). Thus, the only medical testimony admissible must come from a physician approved by the insurance carrier, or ordered by the judge after an adversary hearing.

The insurance carrier has free rein to make approval of the worker's selected IME physician a drawn-out and costly affair, inasmuch as the worker may not be reimbursed for attorney's fees incurred in overcoming the insurance carrier's opposition. (§ 440.13(5)(f), Appendix, J-3)

It is difficult to imagine a more one-sided contest. In a proceeding to contest the insurance carrier's refusal to authorize certain medical treatment, the only way a claimant can obtain medical testimony is to have his IME approved by the adverse party or to obtain the judge's approval after a contested hearing. And for this illusory statutory remedy, the worker was deprived of his common law right to seek redress in a court of law.

Such a tilt of the playing field violates the right of access to the courts for redress under the First Amendment to the U. S. Constitution and under Article I, § 21 of the Florida Constitution.

By the same token, permitting a claimant to present testimony only by physicians approved by the adversary or ordered by the judge violates the due process clause of the Fourteenth Amendment to the U. S. Constitution and Article I, § 9 of the Florida Constitution. There is certainly no "fair opportunity to be heard" when the adverse party must approve one's witness.

And why is the burden imposed on only one class of litigants, the injured worker? What possible legitimate state interest could require restricting access to qualified medical practitioners, either for treatment or for testimony? The end result of this scheme is clear. If an injured worker claims entitlement to treatment by an acupuncturist, and the insurance carrier opposes it, an acupuncturist cannot even testify at the hearing on whether such treatment will be ordered by the judge. In no other adversary proceeding is the access to evidence so restricted. There is no legitimate state interest to be served, only the interests of the insurance carriers. This statute violates the equal protection clause of the Fourteenth Amendment to the U. S. Constitution and Article I, § 2 of the Florida Constitution.

THE INDEPENDENCE OF THE ADJUDICATOR:

Section 440.45, Florida Statutes (1994 Supp.), is set out in Appendix J. The Florida Governor may select an administrative Judge of Compensation Claims (hereafter "JCC") from a list of three provided by the nominating commission, or, pursuant to § 440.45(2)(c), the governor may decline to select from the three candidates, demanding three different candidates. (Appendix, J-4). Once appointed, a JCC serves a four year term unless removed by the governor "for cause", a term nowhere defined in the statute. Clearly, a JCC who approved too many IME requests by injured workers could legally be removed "for cause" if the governor felt so many IME approvals was "encouraging needless litigation" by injured workers seeking additional treatment.

To exacerbate the problem, a JCC who has served a satisfactory term is no longer entitled to automatic renomination, as specified in § 440.45(2)(c). The Florida Supreme Court has ruled that the legislature cannot fetter the governor's discretion to appoint executive branch administrative judges like the JCCs. Jones v. Chiles, 638 So. 2d 48(Fla. 1994). The governor may now completely ignore the nominating commission's evaluation of the JCC and demand a list of three new applicants. (§ 440.45(2)(c), Fla. Stat., 1998 Supp., Appendix K-3)

And who benefits from such unfettered discretion? Is it the injured worker who is out of work, fighting with the insurance carrier over lost wage benefits and medical treatment? Or is it the well-heeled insurance companies who can afford lobbying organizations and large contributions to the governor, his party, and those legislators who support the governor's policies? Under this statutory scheme, any JCC who is too sympathetic to the plight of injured workers is subject to political removal by a governor who tires of hearing complaints from wealthy insurance companies.

This statute violates the access to courts for redress in the First Amendment to the U. S. Constitution and Article I, § 21 of the Florida Constitution. The worker's right to go before an independent judge in a court of law has been extinguished and replaced with an adjudicatory system where the "impartial adjudicator" must be forever mindful of the political forces acting around him, on threat of losing his job on any given day.

An impartial adjudicator has been an essential part of the the concept of "due process" at least since the adoption of Article III, § 1 of the U. S. Constitution, which provides for lifetime tenure and no reduction in compensation during that service. Making the JCCs' tenure hostage to the political whims of the very insurance companies whose cases they try violates the due process clause of the Fourteenth Amendment and Article I, § 9 of the Florida Constitution.

And what other injured parties are required to place their claims against an insurance carrier before an adjudicator who serves at the political whims of the insurance industry? What possible legitimate state interest would be served by such a loading of the dice? This statute violates the equal protection clause of the Fourteenth Amendment, U. S. Constitution and Article I, § 2 of the Florida Constitution.

THE ILLUSORY REMEDY

The diminution of the wage benefits available to an injured employee within Florida's Workers Compensation system is dramatic.

First, an understanding of how benefits are calculated is essential. The starting point is the claimant's "average weekly wage" (AWW), calculated pursuant to § 440.14, Fla. Stat.(1989), as one thirteenth of the total wages earned in the thirteen weeks immediately preceding the injury. (Appendix, I-2).

However, a major diminution in benefits was accomplished by changing the definition of "wages." That is, the 1989 version of § 440.02(21) defined "wages" as including a significant amount of the fringe benefits customarily provided to employees (and which the employer deducts from his federal income taxes as employee wages). (Appendix I-1). However, the fringe benefits included in this definition of "wages" is severely limited in the 1998 version. § 440.02(27), Fla. Stat. (1998 Supp.) (Appendix, K-1).

When an employee is injured the employer is obligated to pay Temporary Total Disability ("TTD") benefits at the rate of 66 2/3 percent of the AWW. § 440.15(2)(a), Fla. Stat. (1998 Supp.). (Appendix, K-1). Since the AWW is reduced by excluding most fringe benefits from the definition of "wages," the injured worker's TTD benefits are similarly reduced.

However, the most dramatic reduction is the amount of time an employee is eligible for TTD benefits. It is now limited to 104 weeks, § 440.15(2)(a), Fla. Stat. (1998 Supp.). (Appendix, K-1), substantially reduced from the 350 weeks previously established. § 440.15(2)(a), Fla. Stat. (1989). (Appendix, I-2)

In a similar fashion the wage benefits available to an injured worker after reaching "maximum medical improvement" (MMI) have been slashed dramatically. Such benefits were previously calculated as "95% of 85% of the employee's average monthly wage and the salary, wages and other remuneration the employee is able to earn after reaching maximum medical improvement;...." § 440.15(3)(b) 1., Fla. Stat. (1989). (Appendix, I-3).

The 95% of 85% formula was also capped at 66 2/3 % of the AWW. Id. This calculation is now "50% of the employee's temporary total disability benefit". § 440.15(3)(a), Fla. Stat. (1998 Supp.) (Appendix, K-2).

Thus, previously, an injured worker with a $100.00 AWW would receive wage loss benefits at a maximum rate of $66.67 for each week in which he had zero earnings due

to his injury. Now, however, the same worker would receive $33.33 per week (50% of his TTD benefit, which is 66 2/3 % of his AWW).

However, the truly dramatic reduction in benefits is the manner in which the maximum term of wage-loss benefits is calculated. A mere ten years ago, the injured worker could rely on benefits to compensate for his wage losses for 525 weeks. § 440.15(3)(b) 3.c., Fla. Stat. (1989). (Appendix, I-3). Today, the eligibility to recover for lost wages depends not on whether the wages are lost due to the injury, but rather on a sliding scale based upon the permanent impairment rating (PIR) assigned by the treating physician. § 440.15(3)(a)3. The eligibility is 3 weeks for each percentage of PIR. § 440.15(3)(a)3.a, Fla. Stat. (1998 Supp.). (Appendix, K-2).

The magnitude of such a decrease cannot be appreciated unless a sample calculation is performed.

Assume three different workers, each with an AWW of $100.00, has an on-the-job back injury, resulting in spinal disk surgery and a 7% PIR. Workers "A" and "B" are covered by the 1989 compensation formula, but worker "C" is covered by the 1998 formula.

Worker "A" is unable to find employment at all due to the residuals of his back injury, (notwithstanding a proven good faith job search which is a prerequisite to wage loss benefits). Worker "B" is able to find only sedentary employment which pays only $50.00 per week, half his previous AWW. Worker "C" is unable to find any employment at all (also despite a good faith job search).

Worker "A" would be eligible for wage loss benefits of $66.67 per week (as long as he completes an acceptable job search each week) for 525 weeks, a total eligibility of $35,001.75.

Worker "B"'s weekly benefits would be calculated as 95% of the difference between 85% AWW and the present earnings; or .95 [(.85) ($100.00) - $50.00] = .95 [85.00 – 50.00] = .95 [35.00] = $33.25. Worker "B" would be

eligible for wage loss benefits (assuming an acceptable job search each week) for 525 weeks, a total eligibility of $17,456.25.

Worker "C"'s weekly benefit would be calculated as 50% of his TTD benefit (which is 66 2/3 % of his AWW) or $33.33. Worker "B" would be eligible for benefits for a period of three weeks for each percent of impairment, or (3 x 7) ($33.33) = (21) ($33.33) = $699.93.

This represents a total eligibility which is a 96% reduction as compared to Worker "B" and a 98 % reduction as compared to Worker "A".

The remedy available under Florida's Workers Compensation Law is no longer a viable alternative to the common law tort remedy which has been taken away from worker "C". Taking away his constitutional right to access to the courts in exchange for such an illusory remedy is not only offensive to any notion of fundamental fairness, but runs afoul of the First and Fourteenth Amendment guarantees of access to courts, due process of law and equal protection of the law.

FEDERAL CONSTITUTIONAL ISSUES

Petitioners' briefs to the Florida appellate court raised constitutional challenges under the due process, equal protection, and access to courts clauses of the Florida Constitution. The corresponding clauses of the federal constitution are nearly identical in wording and legal effect to those of the Florida Constitution. Thus, the state and federal constitutional issues are inextricably intertwined and the state court ruling would constitute res judicata as to Petitioners' federal claims if review were not sought in this Court. District of Columbia Court of Appeals v. Feldman, 460 U. S. 462 (1983).

The equal protection clause of the Florida Constitution states "All natural persons are equal before the law...." Article I, § 2, Florida Constitution. The equal

protection clause of the Fourteenth Amendment commands that no state shall "...deny to any person within its jurisdiction the equal protection of the laws." Amendment 14, § 1, U. S. Constitution.

The due process clause of the Florida Constitution states, "No person shall be deprived of life, liberty or property without due process of law;...." Article I, § 9, Florida constitution. The due process clause of the Fourteenth Amendment reads, "...nor shall any State deprive any person of life, liberty or property without due process of law;...." Amendment 14, § 1, U. S. Constitution.

Finally, the access to courts clause of the Florida Constitution states, "the courts shall be open to every person for redress of injury and justice shall be administered without sale, denial, or delay." Article I, § 21, Florida Constitution. The First Amendment commands, "Congress shall make no law...abridging...the right of the people...to petition the government for a redress of grievances." Amendment 1, U. S. Constitution. Of course, the First Amendment has been construed by this Court as guaranteeing access to courts for redress of grievances for a minority. NAACP v. Button, 371 U. S. 415, 429-430 (1963). Petitioners assert that they are individual members of an entire class – injured workers – who have been essentially disenfranchised by the State of Florida. Where the Workers Compensation Law once was an acceptable substitute for the workers' common law tort remedies in civil court, it is no longer so. The time has come when the wealth and power of insurance companies and the business community which pays insurance premiums have purchased legislative abrogation of the injured workers' legal rights to access to the courts, without any suitable remedy. Petitioners submit they are representatives of a minority class whose rights have been smothered for the economic benefit of the majority; no less so than the Negro citizens involved in NAACP v. Button, supra.

In Ohio v. Robinette, ____ U.S. _____, 117 S. Ct. 417, _____L.Ed.2d _____(1996) this Court dealt with the issue of jurisdiction in examining an opinion of the Ohio Supreme Court and noted:

> Under Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). When 'a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed the federal law required it to do so. (117 S.Ct. 417, 420 quoting from Michigan v. Long, at 463 U.S. 1032, 1040-1041, 103 S.Ct. 3469, 3472)

The Robinette opinion notes that the Ohio Supreme Court mentioned a section of the Ohio Constitution which was identical to the Fourth Amendment, which relates closely to the situation here with Petitioners Bryant and Gunter. This Court likewise accepted jurisdiction in Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990), where that state court seemed to decide on the basis of a Pennsylvania Constitutional provision that the Pennsylvania court noted offered protection that was identical to that provided by the Fifth Amendment. This Court noted in footnote 4:

> The Superior Court's opinion refers to Art. 1, § 9, of the Pennsylvania Constitution but explains that this provision " 'offers a protection against self-incrimination identical to that provided by the Fifth Amendment.'" 377 Pa. Super., at 386, 547 A.2d, at 421 (quoting Commonwealth v. Conway, 368 Pa. Super. 488, 498, 534 A. 2d 541, 546 (1987). The

decision therefore does not rest on an independent and adequate state ground. See Michigan v. Long, 463 U. S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983). 110 S. Ct. 2638, 2643

See also Pennsylvania v. Labron, ____U.S. ____, 116 S.Ct. 2485, ____L.Ed.2d _____(1996), where this Court found the state laws to be interwoven with the federal, so that jurisdiction for this Court's review was proper. Id., 116 S.Ct. 2485, 2487.

The federal constitutional provisions are so nearly identical to the state constitutional provisions in this case that it is inconceivable that Florida's First District Court of Appeal could have failed to consider federal concepts during deliberation on the due process, equal protection and access to courts issues. Yet, the state court's written opinion ("Per Curiam: Affirmed") does not provide on its face an adequate and independent state law ground. Michigan v. Long, 463 U. S. 1032, 1040-1041 (1983).

CONCLUSION

Based on the authorities cited above and the argument submitted in this Petition, the Writ of Certiorari should be granted as to both of these Petitioners.

Respectfully submitted,

DOUGLAS W. ABRUZZO
Post Office Box 714
Gainesville, FL 32602-0714
(352) 371-9691
Counsel of Record for Petitioners

APPENDIX "A"

Excerpts of Order of Judge of Compensation Claims, Hon. Jonathan D. Ohlman, dated March 10, 1998, as to Petitioner Bryant

---

STATE OF FLORIDA
DEPARTMENT OF LABOR AND
EMPLOYMENT SECURITY
OFFICE OF THE JUDGE OF
COMPENSATION CLAIMS
DISTRICT B

JEFF BRYANT,

Claimant,

v.

Claim No. 261-29-2936
D/A 2-14-96

GOLDEN FLAKE and
LIBERTY MUTUAL INS. CO.

Employer

Michael B. Staley, Attorney for Claimant
Mark A. Massey, Attorney for Employer/Carrier

ORDER

Pursuant to due notice of Hearing, this matter came on for hearing before the undersigned at Ocala, Marion County, Florida on Tuesday, September 9, 1997. Present and representing the Employee was Michael B. Staley of Ocala, Florida. Present and representing the Employer/Carrier was Mark A. Massey of Ocala, Florida. With agreement of the parties, final consideration was delayed until February 27, 1998.

***

3.. The initial question is an evidentiary one. The Claimant sought to introduce deposition testimony from Dr. Joel Brooks and Dr. Jose Gaudier, who were the only two medical experts to testify in this case. When the Claimant attempted to introduce medical testimony from the aforementioned witnesses, the E/C raised a timely objection, asserting that neither of the witnesses was qualified to offer medical opinions in light of the limitations set out in Section 440.13(5)(e), Fla. Stat. (1995). The claimant responded by stating that the treatment furnished by Dr. Brooks was done on an emergency basis, and by contending that the statutory limitation on presentation of medical testimony was unconstitutional. With regard to any constitutional arguments, I advised the parties that, as a judge of compensation claims, I could not adjudicate the constitutionality of a statute. Sasso v. Ram Property Management, 431 So. 2d 204 (Fla. 1st DCA 1983), approved on other grounds 452 So. 2d 932 (Fla. 1984), appeal dism'd 469 U. S. 1030, 105 S. Ct. 498 (1984). Therefore, any constitutional arguments would have to be presented to an appropriate forum.

4. As concerns the other arguments for admitting the medical opinions of these two witnesses, the circumstances in this case resemble those as reported in Union Camp Corp. v. Hurst, 696 So. 2d 873 (Fla. 1st DCA 1997), in which an injured worker went on his own to see a physician without seeking prior authorization, and then attempted to introduce testimony from such physician(s) at trial. In the present case, no motion for independent medical examination (IME) was filed prior to trial, and no request for ruling on that issue was made until the date of hearing. As stated by the appellate court in Union Camp:

> The claimant was under an affirmative obligation to request an IME under section

440.13(5)(e), Florida Statutes (Supp. 1994), by the physician of his choice, if he objected to the e/c's decision to controvert his request for benefits based upon the opinions rendered in the independent medical evaluations obtained by the e/c. (citation omitted)

When the claimant in Union Camp attempted to introduce testimony from a health care provider who did not fall into one of the statutorily permitted categories listed in section 440.13(5)(e) of the Florida Statutes, the appellate court ruled that such witness could not properly testify, even though the panel noted that the claimant would have been "entitled to obtain such IME at the expense of the e/c" upon proper request. Similarly, in the present case, even if the claimant receives medical treatment in an emergency setting, and the e/c objects to the introduction of testimony from the physicians whose opinions the claimant seeks to have admitted into evidence, the claimant has an affirmative obligation to request an IME in a timely manner in order to qualify one or more physicians to express opinions on the issue in dispute. When the claimant does not seek a ruling on a request for IME prior to trial, and does not present good cause for the failure to do so, any such request must be considered to have been waived, if the guidelines set out in Union Camp are to be followed.

***

5. Without either Dr. Brooks or Dr. Gaudier qualified as an independent medical examiner, and as neither physician fits the other criteria in Section 440.13(5)(e), Fla.Stat. (1995), there is no medical opinion testimony to support the claimant's position on causation.

***

WHEREFORE, based upon the foregoing findings of fact, the following represents the conclusions of law for these proceedings:

1. The Petition for Benefits must be, and is hereby, denied and dismissed.

DONE AND ORDERED at Gainesville, Alachua County, Florida this 10th day of March, 1998

s/_____
JONATHAN D. OHLMAN
JUDGE OF COMPENSATION CLAIMS

I hereby certify that the foregoing order was entered on the 10th day of March, 1998, and that a conformed copy was sent on that date by U. S. Mail to the parties and counsel of record at their record addresses.

____/s_____
SECRETARY TO JUDGE OHLMAN

APPENDIX "B"

Decision of the District Court of Appeal, First District, State of Florida, filed April 1, 1999 as to Petitioner Bryant

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IS FILED

JEFF BRYANT,
Appellant

v. CASE NO. 98-1430

GOLDEN FLAKE SNACK FOODS, INC. and LIBERTY MUTUAL
Appellees.

_____/

Opinion filed April 1, 1999.

An appeal from Order of Judge of Compensation Claims.

Jonathan D. Ohlman, Judge.

Michael B. Staley , Ocala, for Appellant.

Mark A. Massey of McCarty, Helm, Keeter, Marion, Davis & O'Connor, P.A., Ocala, for Appellees.

PER CURIAM. AFFIRMED

ERVIN, ALLEN AND DAVIS, JJ., CONCUR.

APPENDIX "C"

Order of the District Court of Appeal, First District, State of Florida, denying Rehearing as to Petitioner Bryant

---

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

May 3, 1999

CASE NO.: 1998-1430
L. T. No.: 261-29-2926

Jeff Bryant v. Golden Flake Snack Foods, Inc. And Liberty Mutual

---

Appellant/Petitioner(s) Appellee/Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion filed April 16, 1999, for rehearing or clarification is denied.

I HEREBY CERTIFY that the foregoing is (a true copy) of the original court order.

_____/s_____

JON S. WHEELER, CLERK [SEAL]

Served:

Michael B. Staley Mark A. Massey

APPENDIX "D"

Excerpt of Order of Judge of Compensation Claims, Hon. Jonathan D. Ohlman, dated March 5, 1998 as to Petitioner Gunter.

STATE OF FLORIDA
OFFICE OF THE JUDGE OF
COMPENSATION CLAIMS
DISTRICT "B"

EMPLOYEE:	ATTORNEY FOR CLAIMANT:
WILLIAM GUNTER	MICHAEL B. STALEY, ESQ.
2201 N.C. 37th Street	Post Office Box 4163
Ocala, Florida 34479	Ocala, FL 34478

EMPLOYER:	ATTORNEY FOR E/C/SA:
City of Belleview	ALAN D. KALINOSKI, ESQ.
5343 SE Abshier Blvd.	Post Office Box 2928
Belleview, Florida 34420	Orlando, Florida 32802

CARRIER:	
Florida League of Cities	CLAIM NO.: 267-74-2994
Post Office Box 538135	
Orlando, Florida 32853	D/ACC: 12/3/95

ORDER

AFTER PROPER NOTICE TO ALL PARTIES, a trial was held on this claim in Ocala, Marion County, Florida on October 23, 1997, before the Honorable Jonathan D. Ohlman, Judge of Compensation Claims.

***

With regard to the claims for a psychiatric independent medical examination (IME) by Dr. Cerra and for authorization of psychiatric care, it is important to note the sequence of events. The claim for psychiatric IME was included among the claims on a Petition for Benefits, dated 10-15-96, as well as being listed on the pre-trial stipulation form, which was signed on behalf of the Claimant on 12-30-96. Counsel for the Claimant acknowledged at the beginning of trial that no motion for IME had ever been filed, and that the request for a psychiatric IME had never been called for hearing prior to the date of trial. It is further significant that, upon request of the Employer/Carrier, the trial was continued from the originally scheduled date of 2-7-97 to 10-23-97. However, for reasons not fully explained before or at trial, no motion was filed and no request was ever made prior to the date of trial for any hearing or ruling on the request for a psychiatric IME. As in the case of Union Camp Corp. v. Hurst, 696 So. 2d 873 (Fla. 1st DCA 1997), the Claimant went on his own to see a physician (Dr. Cerra, a local psychiatrist) without seeking prior authorization, and then attempted to introduce testimony from that physician at trial. Again, although there was a request for a psychiatric IME on the pre-trial stipulation, no motion was filed and no request for ruling on that issue was made until the date of hearing. As stated by the appellate court in Union Camp:

> The claimant was under an affirmative obligation to request an IME under section 440.13(5)(e), Florida Statutes (Supp. 1994), by the physician of his choice, if he objected to the e/c's decision to controvert his request for benefits based upon the opinions rendered in the independent medical evaluations obtained by the e/c. (Citation omitted).

When the Claimant in Union Camp attempted to introduce testimony from a health care provider who did not fall into one of the statutorily permitted categories listed in Section

440.13 (5)(e) of the Florida Statutes, the appellate court ruled that such witness could not properly testify, even though the panel noted that the claimant would have been "entitled to obtain such IME at the expense of the e/c" upon proper request. Similarly, in the present case, even if the claimant makes it known that he requests an IME, when the claimant does not seek a ruling on a request for IME prior to trial, and does not present good cause for the failure to do so, any such request must be considered to have been waived. Otherwise the trial would have to be continued after all parties and witnesses had appeared at the forum, and the legislative intent to facilitate the "prompt and cost-effective delivery of payments" will be unnecessarily frustrated and delayed.

***

Nevertheless, under the circumstances presented, I find that the request by the Claimant for a psychiatric IME has been waived by the failure to seek a ruling on that request prior to the date of trial. With that waiver, the objection of the E/SA to the testimony of Dr. Cerra must be sustained, and the medical opinions of Dr. Cerra must be excluded from consideration as he does not fall into a statutorily permitted category of medical witnesses. Without such testimony for Dr. Cerra, the record does not contain competent and substantial evidence to support a determination that the subject incident was the major contributing cause of any psychiatric injury; to support a determination by "clear and convincing evidence," to use the language of Section 440.09(1) of the Florida Statutes, that any mental or nervous injury sustained by the Claimant was compensable; or to support the claim for authorization of psychiatric care and treatment. Accordingly, the claims for such must be denied.

***

WHEREFORE, based upon the foregoing findings of fact, the following represent the conclusions of law for these proceedings:

***

4. Authorization of a psychiatrist is denied.
5. Authorization of a psychiatric IME is denied.

***

DONE AND ORDERED in Chambers at Gainesville, Alachua County, Florida.

_S/_____
JONATHAN D. OHLMAN
JUDGE OF
COMPENSATION CLAIMS

THIS IS TO CERTIFY that on March 5th, 1998, the above Order was entered in the office of the Judge of Compensation Claims, and a copy was mailed to each party and counsel at the address listed above.

__s/_____
Judicial Assistant

APPENDIX "E"

Decision of the District Court of Appeal, First District, State of Florida, filed April 12, 1999 as to Petitioner Gunter

IN THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IS FILED

WILLIAM GUNTER,
Appellant

V.

CASE NO. 98-1386

CITY OF BELLEVIEW POLICE DEPARTMENT and FLORIDA LEAGUE OF CITIES, INC.,
Appellees.

_____/

Opinion filed April 12, 1999.
An appeal from Order of Judge of Compensation Claims.
Jonathan D. Ohlman, Judge.
Michael B. Staley of Michael B. Staley & Associates, P.A., Ocala, for Appellant.
Lamar D. Oxford of Dean, Ringers, Morgan & Lawton, Orlando, for Appellees.
PER CURIAM. AFFIRMED.
ERVIN, ALLEN and DAVIS, JJ., CONCUR.

APPENDIX "F"

Order of the District Court of Appeal, First District, State of Florida, denying Rehearing as to Petitioner Gunter

---

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

May 4, 1999

CASE NO.: 1998-1386
L. T. No.: 267-74-2994

William Gunter v. City of Belleview Police Dept And Fl League Etc.

Appellant/Petitioner(s) Appellee/Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion filed April 20, 1999, for rehearing or clarification is denied.

I HEREBY CERTIFY that the foregoing is (a true copy) of the original court order.

_____/s_____

JON S. WHEELER, CLERK [SEAL]

Served:

Michael B. Staley/Alan D. Kalinoski/
Lamar D. Oxford

APPENDIX "G"

Excerpts from Petitioner Bryant's Initial Brief in the District Court of Appeal, First District, State of Florida

***

ARGUMENT

I

§ 440.15, FLA. STAT. (1994) VIOLATES THE DUE PROCESS, EQUAL ACCESS TO COURTS AND EQUAL PROTECTION OF LAWS PROVISIONS OF THE FLORIDA CONSTITUTION.

II

§ 440.13(5)(e), FLA. STAT. (1994) IS UNCONSTITUTIONAL IN ITS RESTRICTION OF MEDICAL TESTIMONY

III

§ 440.45(2), FLA. STAT. (1994) IS UNCONSTITUTIONAL TO THE EXTENT THAT IT VIOLATES ART. II, § 3 OF THE FLORIDA CONSTITUTION AS WELL AS THE DUE PROCESS CLAUSE OF ART. I, § 9 OF THE FLORIDA CONSTITUTION.

APPENDIX "H"

Excerpt of Petitioner Gunter's Initial Brief in the District Court of Appeal, First District, State of Florida

***

ARGUMENT

I

§ 440.15, FLA. STAT. (1994) VIOLATES THE DUE PROCESS, EQUAL ACCESS TO COURTS AND EQUAL PROTECTION OF LAWS PROVISIONS OF THE FLORIDA CONSTITUTION

II

§ 440.13(5)(E), FLA. STAT. (1994) IS UNCONSTITUTIONAL IN ITS RESTRICTION OF MEDICAL TESTIMONY

III

§ 440.45(2), FLA. STAT. (1994) IS UNCONSTITUTIONAL TO THE EXTENT THAT IT VIOLATES ART. II, § 3 OF THE FLORIDA CONSTITUTION AS WELL AS THE DUE PROCESS CLAUSE OF ART. I, § 9 OF THE FLORIDA CONSTITUTION.

APPENDIX "I"

Excerpts of Florida Statutes, 1989

440.02. Definitions

When used in this chapter, unless the context clearly requires otherwise, the following terms shall have the following meanings:

***

(21) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, together with the reasonable value of board, meals, rent, housing, lodging, parking; employer contributions for uniforms or cleaning allowances; employer contributions for legal, life, health, accident, or disability insurance for the employee or dependents, excluding social security benefits; contributions to pension plans to the extent that the employee's rights have vested; any other consideration received from the employer that is considered income under the Internal Revenue Code in effect on January 1, 1987; and gratuities received in the course of employment from others than the employer, only when such gratuities are received with the knowledge of the employer. In employment in which an employee receives consideration other than cash as a portion of this compensation, the reasonable value of such compensation shall be the actual cost to the employer.

***

440.14. Determination of pay-

(1) Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of

the injury shall be taken as the basis upon which to compute compensation and shall be determined, subject to the limitations of s. 440.12(2), as follows:

(a) If the injured employee has worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of 13 weeks immediately preceding the injury, his average weekly wage shall be one-thirteenth of the total amount of wages earned in such employment during the 13 weeks.

***

440.15. Compensation for disability.

Compensation for disability shall be paid to the employee, subject to the limits provided in s. 440.12(2), as follows:

***

(2) Temporary total disability.--

(a) In case of disability total in character total in character but temporary in quality, 66 2/3 percent of the average weekly wages shall be paid... not to exceed 350 weeks except as provided in s. 440.12(1).

***

(3) Permanent impairment and wage-loss benefits.--

***

(b) Wage-loss benefits.

1. Each injured worker who suffers any permanent impairment, which permanent impairment is determined pursuant to the schedule adopted in accordance with subparagraph (a) 3., may be entitled to wage-loss benefits under this subsection. Such benefits shall be based on actual wage loss and shall not be subject to the minimum compensation rate set forth in s. 440.12(2). Subject to the maximum compensation rate as set forth in s. 440.12 (2),

such wage-loss benefits shall be equal to 95 percent of the difference between 85 percent of the employee's average monthly wage and the salary, wages, and other remuneration the employee is able to earn after reaching maximum medical improvement, as compared monthly; however, the monthly wage-loss benefits shall not exceed an amount equal to 66 2/3 percent of the employee's average monthly wage at the time of the injury. In order to simplify the comparison of the preinjury average monthly wage with the salary, wages, and other remuneration the employee is able to earn after reaching maximum medical improvement, the division may by rule provide for the modification of the monthly comparison so as to coincide as closely as possible with the injured worker's pay periods.

***

3. The right to wage-loss benefits shall terminate:

***

c. For injuries occurring after July 1, 1980, 525 weeks after the injured employee reaches maximum medical improvement, whichever comes first.

***

APPENDIX "J"

Excerpts of Florida Statutes (1994 Supp.)

440.13 Medical Services and Supplies; Penalty for Violations; Limitations

(1) DEFINITIONS. – As used in this section, the term:

***

(j) "independent medical examiner" means a physician selected by either an employee or a carrier to render one or more independent medical examinations in connection with a dispute arising under this chapter.

***

(2) MEDICAL TREATMENT; DUTY OF EMPLOYER TO FURNISH.---

***

(c) If the employer fails to provide treatment or care required by this section after request by the injured employee, the employee may obtain such treatment at the expense of the employer, if the treatment is compensable and medically necessary. There must be a specific request for the treatment, and the employer or carrier must be given a reasonable time period within which to provide the treatment or care. However, the employee is not entitled to recover any amount personally expended for the treatment or service unless he has requested the employer to furnish that treatment or service and the employer has failed, refused, or neglected to do so within a reasonable time or unless the nature of the injury requires such treatment, nursing, and services and the employer or his superintendent or foreman,

having knowledge of the injury, has neglected to provide the treatment or service.

***

(3)

PROVIDER ELIGIBILITY; AUTHORIZATION.---

(a) As a condition to eligibility for payment under this chapter, a health care provider who renders services must be a certified health care provider and must receive authorization from the carrier before providing treatment. This paragraph does not apply to emergency care. the division shall adopt rules to implement the certification of health care providers. As a one-time prerequisite to obtaining certification, the division shall require each physician to demonstrate proof of completion of a minimum 5-hour course that covers the subject areas of cost containment, utilization control, ergonomics, and the practice parameters adopted by the division governing the physician's field of practice.

***

(5) INDEPENDENT MEDICAL EXAMINATIONS. --

(a) In any dispute concerning overutilization, medical benefits, compensability, or disability under this chapter, the carrier or the employee may select an independent medical examiner. The examiner may be a health care provider treating or providing other care to the employee. An independent medical examiner may not render an opinion outside his area of expertise, as demonstrated by licensure and applicable practice parameters.

***

(e) No medical opinion other than the opinion of a medical advisor appointed by the judge of compensation claims or division, an independent medical examiner, or an authorized treating provider is admissible in proceedings before the judges of compensation claims.

(f) Attorney's fees incurred by an injured employee in connection with delay of or opposition to an independent medical examination, including, but not limited to, motions for protective orders, are not recoverable under this chapter.

440.45 Office of Judges of Compensation.

***

(2) (a) The Governor shall appoint full-time judges of compensation claims to conduct proceedings as required by this chapter or other law.

***

(b) The Governor shall initially appoint a judge of compensation claims from a list of three persons nominated by a statewide nominating commission.

***

(c) Each judge of compensation claims shall be appointed for a term of 4 years, but during the term of office may be removed by the Governor for cause. Prior to the expiration of a judge's term of office, the statewide nominating commission shall review the judge's conduct. The commission shall report its finding to the Governor no later than 6 months prior to the expiration of the judge's term of office. The report of the commission shall include a list of three candidates for appointment. The candidates shall include the judge whose term is expiring, if that judge desires reappointment and the judge's performance is

satisfactory upon review by the commission. If a vacancy occurs during a judge's unexpired term, the commission shall issue a report to the Governor which includes a list of three candidates for appointment. The Governor shall review the commission's report, and may select one of the listed candidates. If no candidate is selected, the Governor shall so inform the commission, which shall within 2 months issue a report to the Governor which includes a list of three different candidates for appointment.

***

APPENDIX "K"

Excerpts of Florida Statutes (1998 Supp.)

440.02 . Definitions - When used in this chapter, unless the context clearly requires otherwise, the following terms shall have the following meanings:

***

(27) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury and includes only the wages earned and reported for federal income tax purposes on the job where the employee is injured and any other concurrent employment where he or she is also subject to workers' compensation coverage and benefits, together with the reasonable value of housing furnished to the employee by the employer which is the permanent year-round residence of the employee, and gratuities to the extent reported to the employer in writing as taxable income received in the course of employment from others than the employer and employer and employer contributions for health insurance for the employee or the employee's dependents.

***

440.15

***

(2) TEMPORARY TOTAL DISABILITY.-

(a) In case of disability total in character but temporary in quality, 66 2/3 percent of the average weekly wages shall be paid to the employee during the continuance thereof, not to exceed 104 weeks except as provided in this subsection, s. 440.12(1), and s. 440.14(3). Once the employee reaches the maximum number of weeks allowed,

or the employee reaches the date of maximum medical improvement, whichever occurs earlier, temporary disability benefits shall cease and the injured worker's permanent impairment shall be determined.

***

(3) PERMANENT IMPAIRMENT AND WAGE-LOSS BENEFITS. –

(a) Impairment benefits.---

***

3. All impairment income benefits shall be based on an impairment rating using the impairment schedule referred to in subparagraph 2. Impairment income benefits are paid weekly at the rate of 50 percent of the employee's average weekly temporary total disability benefit not to exceed the maximum weekly benefit under s. 440.12. An employee's entitlement to impairment income benefits begins the day after the employee reaches maximum medical improvement or the expiration of temporary benefits whichever occurs earlier, and continues until the earlier of:
   a. The expiration of a period computed at the rate of 3 weeks for each percentage point of impairment; or
   b. the death of the employee.

440.45 Office of the Judges of Compensation Claims.-

***

(2)(a) The Governor shall appoint full-time judges of compensation claims to conduct proceedings as required by this chapter or other law.

***

(b) Except as provided in paragraph (c), the Governor shall appoint a judge of compensation claims from a list of three persons nominated by a statewide nominating commission.

***

(c) Each judge of compensation claims shall be appointed for a term of 4 years, but during the term of office may be removed by the Governor for cause. Prior to the expiration of a judge's term of office, the statewide nominating commission shall review the judge's conduct and determine whether the judge's performance is satisfactory. If the judge's performance is deemed satisfactory, the commission shall report its finding to the Governor no later than 6 months prior to the expiration of the judge's term of office. The Governor shall review the commission's report and may reappoint the judge for an additional 4-year term. If the Governor does not reappoint the judge, the Governor shall inform the commission. The judge shall remain in office until the Governor has appointed a successor judge in accordance with paragraphs (a) and (b). If a vacancy occurs during a judge's unexpired term, the statewide nominating commission does not find the judge's performance is satisfactory, or the Governor does not reappoint the judge, the Governor shall appoint a successor judge for a term of 4 years in accordance with paragraph (b).

***

(2)

Supreme Court, U.S.
FILED

99 298 AUG 2 1999

OFFICE OF THE CLERK

No.

In The

SUPREME COURT OF THE UNITED STATES

JEFF BRYANT,

Petitioner,

v.

GOLDEN FLAKE SNACK FOODS, INC. and LIBERTY MUTUAL INSURANCE CO.

Respondents

and

WILLIAM GUNTER,

Petitioner,

v.

CITY OF BELLEVIEW and FLORIDA LEAGUE OF CITIES,

Respondents

On Petition for Writ of Certiorari To
The District Court of Appeal, First District
State of Florida

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX

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APPENDIX "M".....Order of Judge of Compensation Claims, Hon. Jonathan D. Ohlman, dated March 5, 1998, as to Petitioner Gunter.

APPENDIX "N".....Excerpt of Record of Hearing as to Petitioner Bryant before Hon. Jonathan D. Ohlman, Judge of Compensation Claims, held on September 9, 1997.

APPENDIX "O".....Order of Judge of Compensation Claims, Hon. Jonathan D. Ohlman, dated March 10, 1998, as to Petitioner Bryant.

APPENDIX "L"

Excerpt of Record of Hearing as to Petitioner Gunter before Hon. Jonathan D. Ohlman, Judge of Compensation Claims, held on October 23, 1997

***

MR. STALEY: Yes, Your Honor. The first deposition of Dr. Cerra was filed months and months ago. No objection was raised at that time regarding it. Regarding the second deposition, no specific objection as to those grounds was raised there, and alternatively, he should be considered as an IME and we, -- when just --just the games basically of having him perform an additional and separate cumulative exam for this whole purpose of being able to testify. Also, I would raise issues regarding some of his testimony may be observance as opposed to expert testimony, and that, in my belief, the provision precluding certain expert witness testimonies would be a violation of the constitution on several grounds, and I think we agreed at previous times that the specific violates would not need to be cited here since-- (Transcript, p. 630-631)

***

JUDGE OHLMAN: Okay, I'm going to allow the testimony--by the deposition--to be introduced into evidence, but reserve ruling on the various questions and answers that opposed Dr. Cerra.. I interpret the law that 440.13 (5) (e)--I think it is--precludes any medical opinion. But for example, just in picking up Dr. Cerra's deposition, he in the beginning discusses the statements made to him by the claimant which I do not believe falls under the category of a medical opinion. He also, I think, discusses other matters which may mot constitute a medical opinion, so I think the deposition itself is not necessarily precluded in terms of the opinions

expressed. I guess I'll have to wait and review that in the overall totality of the evidence.

Mr. Staley, let me address --- I agree that you don't need to raise any constitutional arguments at this level, but I don't want that to be interpreted that I am precluding any presentation of evidence or other---whatever you want to do. I simply mean that I ---argument for the purpose of persuading me to rule one way or the other on a constitutional issue doesn't make much sense, but whatever evidence or other matters you believe needs to be presented on that issue, I don't mean in any way to limit you from. So, with that, are there any other objections to any of the evidence? (Transcript, p. 633-634)

APPENDIX "M"

Order of Judge of Compensation Claims, Hon. Jonathan D. Ohlman, dated March 5, 1998 as to Petitioner Gunter.

STATE OF FLORIDA
OFFICE OF THE JUDGE OF
COMPENSATION CLAIMS
DISTRICT "B"

EMPLOYEE:	ATTORNEY FOR CLAIMANT:
WILLIAM GUNTER	MICHAEL B. STALEY, ESQ.
2201 N.C. 37th Street	Post Office Box 4163
Ocala, Florida 34479	Ocala, FL 34478

EMPLOYER:	ATTORNEY FOR E/C/SA:
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CARRIER:
Florida League of Cities
Post Office Box 538135
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CLAIM NO.: 267-74-2994

D/ACC: 12/3/95

ORDER

AFTER PROPER NOTICE TO ALL PARTIES, a trial was held on this claim in Ocala, Marion County, Florida on October 23, 1997, before the Honorable Jonathan D. Ohlman, Judge of Compensation Claims. Present at the trial

were the claimant, William Gunter, and his attorney, Michael B. Staley. Appearing on behalf of the Employer/Carrier was Alan D. Kalinoski. At the conclusion of the hearing, the parties requested an opportunity to present one or more proposed orders in lieu of any closing argument or memorandum of law. This request was granted and, with the agreement of the parties to waive the timeliness requirements in the rules and statutes, final consideration was delayed until February 28, 1998.

At the pre-trial conference or prior to the conclusion of the proceedings, the parties stipulated to the following:

1. The Judge of Compensation Claims has jurisdiction over the subject matter and the parties.

2. The date of accident was 12/3/95, and an employee/employer relationship existed on the date of accident. All other dates of accident were withdrawn.

3. The proper venue is Marion County, Florida.

4. Workers' compensation insurance was in effect on the date of the accident.

5. The accident was accepted as compensable.

6. There was timely notice of the accident, of the pre-trial conference and of the final hearing.

7. The base average weekly wage (AWW) is $649.72 with a corresponding compensation rate of $433.15. Fringe benefits were continuing as of the date of the final hearing.

8. Notices of Denial were filed on 3/26/96, 5/3/96, 6/3/96, 2/4/97 and 2/10/97, although the Claimant agreed to waive any claim for penalties in light of the filing of these documents in a timely manner.

9. The parties agree that the claimant reached MMI per Dr. Overcash on 3/22/96. The parties disagreed on the impairment rating. The parties also disagreed as to whether the claimant is at MMI from a psychiatric standpoint, although the E/C denies any causal relationship between the claimant's psychiatric treatment and the 12/3/95 accident.

10. If medical benefits under §440.13 are determined to be due, the exact amounts payable to health care providers will be handled administratively, and the medical bills need not be placed into evidence.

11. The claimant received authorized medical treatment from Dr. William Todd Overcash.

12. The claimant continued working until 12/29/95 and TTD benefits were paid from 12/29/95 through 3/20/96.

13. Petitions for Benefits were sent, dated 3/18/96, 4/22/96, 5/30/96, 10/15/96 and 12/30/96.

14. Evidence regarding entitlement and amount of attorney's fees, if necessary, will be introduced by hearing.

15. The following documentary items were admitted into evidence:

E/C and Claimant's Joint Exhibit:

Pre-Trial Stipulation and Compliance Questionnaire.

Claimant's Exhibits:

Deposition of Charles Vowinkle taken 1/24/97;

Deposition of Dr. Edward Weinshelbaum taken 7/15/97;

Deposition of Dr. Edward Weinshelbaum taken 7/29/97;

Deposition of Dr. Domingo Cerra taken 1/31/97;

Deposition of Dr. Domingo Cerra taken 9/26/97;

Photograph of claimant's gunbelt; and

Letter dated 9/19/96 from Belleview Chief of Police E. J. Becker to claimant.

E/C's Exhibits:

Deposition of Dr. William Overcash taken 10/11/96;

Deposition of Dr. Earl Stewart taken 1/30/97;

Deposition of Dr. Donald Hagan taken 5/29/96;

Records from Ocala Police Dept. (three pages); and

Medical records from Dr. Earl Stewart.

The Employer/Carrier objected to the admissibility of the two depositions of Dr. Cerra citing §440.13 (5) (e) which provides that "no medical opinion other than the opinion of a medical adviser appointed by the judge of compensation claims or Division, an independent medical examiner, or an authorized treating provider is admissible before the judges of compensation claims." That objection is addressed later in this order.

At the trial, live testimony was taken from the claimant, William Gunter; the claimant's wife, Bobbi Gunter; Chief Emil J. Becker; and Ruth Peters.

The issues claimed, as narrowed immediately prior to the final hearing are as follows:

1. Compensability of left side problems.
2. Temporary partial disability (TPD) from 3/21/96 and continuing through the date of the hearing.
3. Permanent total disability (PTD) from 1/31/97 and continuing through the date of the hearing.
4. Authorization of a psychiatrist.
5. Authorization of a psychiatric IME with Dr. Domingo Cerra.
6. Interest, costs and attorney's fees.

The original claim as provided in the Pre-Trial Stipulation was for "compensability of left side hernia." The claimant moved to amend his claim at the time of trial to "compensability of left side problems." The Court granted this amendment to the claim under the authority of Sabal Transport v. Brooks, 666 So. 2d 1032 (Fla. 1st DCA 1996). Additionally, the Claimant waived any claim that the JCC should determine that disability should be based upon "full pay status" in light of the ruling in Williams v. City of Fort

Walton Beach, 691 So. 2d 580 (Fla. 1st DCA 1997); waived any claim for benefits arising out of the 1988 injuries; and waived any claim for benefits arising out of the 1988 injuries; and waived any claim for statutory penalties. The parties agreed that the abdominal surgery which had been requested had been performed; therefore, that issue was now moot, except for whether an attorney's fee was due because of an untimely authorization of the surgery.

The defenses raised by the Employer/Carrier, and set out on the pre-trial stipulation form, are as follows:

1. The 12/3/95 accident has been accepted as compensable, although there was no hernia caused as a result of the 12/3/95 incident.

2. The claimant has had multiple hernia and abdominal problems dating as far back as 1971, which are not causally related to the 12/3/95 incident.

3. The 12/3/95 incident is not the major contributing cause of the claimant's current problems.

4. The claimant's current problems are related to long standing abdominal weakness, which resulted in numerous surgeries which were unrelated to and pre-existed the 12/3/95 incident.

5. The claimant was released to return to work on 3/15/96 per Dr. Overcash; the claimant actually returned to work on 3/21/96; the claimant was placed at MMI by Dr. Overcash on 3/22/96 with a 0% impairment.

6. The Employer has continuously maintained work available for the claimant which the claimant has refused; claimant has voluntarily limited his income and is not entitled to additional indemnity benefits pursuant to §440.15(7).

7. The claimant is not catastrophically injured pursuant to §440.15 (1), and no permanent total disability benefits are due.

8. Claimant's alleged psychiatric problems are not related to the 12/3/95 incident; psychiatric treatment not

medically necessary; insufficient physical injury resulting from the 12/3/95 incident.

9. The claimant received treatment from Dr. Domingo Cerra, psychiatrist, which was unauthorized, prior to filing a Petition for Benefits for a psychiatric IME with Dr. Cerra. Accordingly, Dr. Cerra cannot be designated as a psychiatric IME.

10. No interest, costs or attorney's fees due.

This case involves a 52 year old police officer who has been employed by the City of Belleview for approximately fifteen (15) years. On December 3, 1995, William Gunter claims an accident while getting into his patrol car when his gunbelt pressed on his abdomen, and he stated that he thought he felt a "pop" in his stomach area. The claimant believed that he incurred a hernia as a result of this incident. However, according to the greater weight of the medical evidence, no such hernia occurred.

Prior to the 12/3/95 incident, the claimant had approximately eight (8) prior hernia and abdominal surgeries. The claimant's first hernia problem and resulting surgery occurred as a result of an accident which occurred in 1971 while the claimant was working for the City of Ocala. On 12/19/90, the claimant incurred a ruptured diverticula which required a colostomy. The claimant had a reversal of the colostomy in April 1991 and underwent surgery for adhesions in May 1991. The claimant had an incisional hernia repair done in September 1991. The claimant had another incisional hernia repair performed on 12/3/91. The claimant had a hernia repair at the prior colostomy site on 4/26/93. Finally, the claimant incurred a hernia repair with mesh on 4/6/94.

In July and November of 1995, the claimant treated with Dr. Hagan concerning pain and problems wearing his gunbelt and vest. The claimant continued to mention abdominal pain through the date of the 12/3/95 incident, but testified that he was able to work and perform various

physical tasks before the subject incident. Following this incident in 1995, the claimant continued working with the City of Belleview and did not seek medical care until about a month after the 12/3/95 incident. The claimant came under the care of Dr. Overcash who on 3/5/96 performed an exploration of the claimant's prior incisions. Although it was suspected that the claimant may have incurred a hernia, no hernia was confirmed by the exploratory procedure performed by Dr. Overcash or by Dr. Weinshelbaum's examination. Dr. Overcash released the claimant to return to work on 3/15/96 and placed the claimant at MMI on 3/22/96 with a zero percent (0%) impairment rating and no restrictions.

The claimant returned to work with the City of Belleview through August 30, 1996, at which time he stopped coming into work, shortly after he had been disciplined by the Chief of Police for various acts of insubordination. The Employer maintained that they had work available for the claimant since 8/30/96, which the claimant has refused. The claimant has not returned to work since then.

Prior to making any request to the Employer/Carrier for authorization of a psychiatrist, the claimant initially went to see an Ocala psychiatrist, Dr. Domingo Cerra, on 9/10/96. Dr. Cerra was not ever authorized by the Employer/Carrier to provide treatment to the claimant. No Petition for Benefits was filed regarding authorization of a psychiatrist until 10/15/96. Through the time of the trial, no motion had been filed by the claimant regarding a psychiatric IME with Dr. Cerra, and there was no request for continuance of the trial so that the issue of a psychiatric IME could be addressed prior to a decision on the merits.

In making my findings of fact and conclusions of law on the claim, I have carefully considered and weighed all of the evidence presented to me, both by deposition testimony and by the live testimony presented at the trial. I have observed the candor and demeanor of the witnesses who

appeared live before me and I have attempted to resolve all of the conflicts in the evidence. Based upon the foregoing, the evidence and the applicable law, I make the following determinations:

I approve and adopt the stipulations of the parties as findings of fact as if set out at length herein.

Following my review of all of the evidence, I find that the incident of 12/3/95 qualified as an accident. However, there was no competent substantial medical evidence adduced at the final hearing to establish that the 12/3/95 incident resulted in any verifiable, permanent physical "injury" as defined by §440.02 (17). Accordingly, I find that the 12/3/95 accident did not result in any permanent physical incapacity, and the parties have stipulated that the E/SA provided TTD benefits from shortly after the accident through 3/20/96. Even if the exploration procedure performed by Dr. Overcash in early March 1996 could be viewed as causing some type of limited trauma of injury, there is no evidence of any disability from the time Dr. Overcash released the claimant to return to work with no restrictions on 3/22/96. Therefore, I find that the claimant is not entitled to temporary partial disability (TPD) from 3/22/96 and continuing.

Pursuant to the agreement of the parties, the claimant reached MMI per Dr. Overcash on 3/22/96. I find that the claimant has not suffered any permanent impairment as a result of the 12/3/95 incident. I further find that the claimant is not catastrophically disabled as required by §440.02 (34), and the claimant, therefore, is not entitled to permanent total disability (PTD) benefits pursuant to §440.15 (1).

The claimant testified that on 12/3/95, while in the course and scope of his employment, his gunbelt and protective vest pressed on his abdomen as he was getting into his patrol car. Section 440.02 (1) defines the term "accident" as "an unexpected or unusual event or result that happens suddenly. A mental or nervous injury due to stress ... is not an injury by accident arising out of the

employment." By giving §440.02 (1) a broad interpretation, the claimant technically sustained an accident. However, for ongoing benefits to be payable from an accident, there must be an actual physical injury and disability resulting from the accident. Section 440.02 (17) defines injury as "personal injury or death by accident arising out of and in the course of employment." The evidence shows that while the claimant believed that he had sustained a hernia as a result of the 12/3/95 incident, no hernia or other injury was incurred according to the greater weight of the medical evidence.

Following the 12/3/95 incident, the claimant continued working his regular job for over a month before obtaining any medical treatment. The claimant complained of abdominal pain and felt that he might have sustained another hernia. The workers' compensation carrier authorized medical care for the 12/3/95 incident and the claimant came under the care of Dr. William Todd Overcash, general and vascular surgeon. Based upon the history given by the claimant, Dr. Overcash suspected that the claimant may have sustained another hernia. Dr. Overcash performed a diagnostic procedure on 3/5/96 which revealed that the claimant did not incur a hernia. Dr. Overcash testified that this was a condition that was caused by the multiple prior abdominal surgeries related to the 1990 ruptured diverticulitis problem and resulting colostomy. Dr. Overcash specifically indicated that the pressure of the protective vest and gunbelt should not cause or aggravate the claimant's prior inguinal hernia and/or abdominal problems.

Dr. Overcash informed the claimant that he did not detect a hernia and that he should return to work wearing the gunbelt and protective vest. He felt that the claimant could return to work with no restrictions as of 3/22/96. As previously set out, the E/SA provided TTD benefits from late December through 3/20/96. Dr. Overcash thought that the claimant could functionally return to full duty, but felt that the claimant chose not to do so. Dr. Overcash felt that the claimant's motivation to return to work was somewhat

suspect, as he indicated that the claimant was apparently able to ride his Harley Davidson motorcycle, but did not feel that he could return to work. Dr. Overcash's testimony is corroborated by the testimony of Dr. Weinshelbaum, who first examined the claimant on 3/29/96. Dr. Weinshelbaum agreed that the exploratory procedure did not reveal any evidence of any recurrent hernias, and that the CT scan was normal. The claimant had subjective pain without any objective findings. Dr. Weinshelbaum testified that it would be speculative to state that the 12/3/95 incident even aggravated the claimant's problems. Dr. Weinshelbaum deferred to Dr. Overcash regarding any connection between the claimant's symptoms of pain and the claimant's employment. Dr. Weinshelbaum did not have any knowledge of the events regarding the 12/3/95 incident, and he felt that Dr. Overcash should have more precise knowledge. Accordingly, to the extent that there is any conflict between the testimony of Dr. Overcash and Dr. Weinshelbaum, I rely upon the testimony of Dr. Overcash, primarily because Dr. Overcash had more contact with the Claimant, although there does not seem to be a significant amount of inconsistency between the two.

The claimant has the burden of proving that he sustained a work related accident and resulting injury and, in cases of subsequent injuries and pre-existing conditions, that the work related injury is the "major contributing cause" of the subsequent injury or aggravation. See Mangold v. Rain Forest Gulf Sports Center, 675 So. 2d 639 (Fla. 1st DCA 1996); §440.09 (1) (a) & (b), Florida Statutes (Supp. 1994). Dr. Overcash specifically found that the claimant did not sustain any injury as a result of the 12/3/95 incident, and this testimony is unrefuted by the testimony of any other authorized doctor.

It could conceivably be argued that although the 12/3/95 incident did not result in any specific injury, the exploration procedure performed by Dr. Overcash itself may have caused some type of injury. Such an argument is

refuted by the medical evidence. Dr. Overcash specifically described the exploratory procedure. He indicated that the procedure involved only a skin incision. The exploratory procedure did not involve an incision of the muscle or fascia. The exploratory procedure should have only created tenderness which would resolve within a two week period of time. Nor did the exploratory procedure cause the claimant any permanent impairment. Even if, assuming arguendo, the exploratory procedure caused some inherent injury, there is no evidence of any disability from the time Dr. Overcash released the claimant to return to work with no restrictions effective 3/22/96, and the Claimant received benefits during this period. He was placed at MMI on that date with no permanent impairment. Accordingly, the claimant is not entitled to additional temporary disability benefits.

The serious nature and extent of the claimant's pre-existing abdominal problems cannot be overlooked. With approximately eight prior hernia and abdominal surgeries, it is beyond challenge that the claimant had experienced significant abdominal problems. Although the claimant testified that he was in "relatively good health" and was only experiencing "slight" abdominal soreness prior to the 12/3/95 incident, other evidence is not entirely consistent with that opinion. The testimony and medical records of Dr. Earl Stewart, board certified general surgeon, provide documentation of the extent of the significant abdominal problems the claimant incurred which pre-existed the 12/3/95 incident.

Rita Taylor also testified at the final hearing concerning the significance of the claimant's pre-existing problems. She was a data entry clerk at the time of the 12/3/95 incident and indicated that , prior to the 12/3/95 incident, the claimant was on light duty and had been sick repeatedly with abdominal problems. Ms. Taylor was aware of the fact that the claimant had several operations prior to the 12/3/95 incident. Ms. Taylor did not actually observe the claimant performing his work duties following the 12/3/95

incident, but she was aware of the claimant's significant pre-existing abdominal problems.

Although the claimant characterized his abdominal problems prior to the 12/3/95 incident as being only "slight," the record shows that the claimant came under the care of Dr. Donald Hagan in July 1995, for abdominal pains. In fact, the claimant treated with Dr. Hagan approximately one month prior to the 12/3/95 incident at which time he was again complaining of abdominal discomfort. The claimant was noted to have a lot of scar tissue and inherent weakness over the abdominal area involving "such a large piece of mesh." Furthermore, Dr. Hagan suggested that the claimant not wear the gunbelt and vest. Dr. Hagan felt that the claimant should not wear the gunbelt and vest because it made him feel uncomfortable. Accordingly, the evidence shows that any restriction against the claimant wearing the gunbelt and vest was not the result of the 12/3/95 incident, but existed prior to that time.

The claimant testified that he returned to work for the Belleview Police Department on 3/21/96 and that Dr. Overcash had released him to work with no restrictions. The claimant indicated that even though Dr. Overcash did not place any restrictions on him, he was allowed to work without being required to wear the gunbelt and vest and was allowed to remain in the office to provide advice and guidance to subordinates without having to respond to regular police calls. The claimant admitted that Chief Emil Becker agreed to these accommodations so the claimant would not be exposed to re-injure himself or others. the claimant indicated that work was maintained available for him after his accident and he was never told that he did not have a job. He acknowledged that he stopped working for the City of Belleview on or about 8/30/96, indicating that he stopped coming into work on his own, without a medical excuse. Complicating the cause of the claimant's current medical problems and alleged disability was the fact that the claimant was injured in an explosion accident at home in

January of 1997. The force of the explosion lifted the claimant into the air and caused severe burns to his arms, left side of his body, and to his wrist. Furthermore, the claimant had another unrelated medical problem which required right shoulder surgery in October of 1997, just a few days prior to the trial.

Emil J. Becker, Police Chief for the City of Belleview, testified on behalf of the Employer/Carrier. Chief Becker is currently the Chief of Police for the City of Belleview, and stated that he has known the claimant for about twenty (20) years. Chief Becker indicated that the claimant had been a good employee and a good police officer. I accept Mr. Becker's testimony as credible. To the extent that there is any conflict between the testimony of Mr. Becker and the claimant, I rely upon the testimony of Mr. Becker, who testified that the claimant had been promoted to a position which put him near the top in command for the police department.

Mr. Becker was aware of the claimant's prior problems concerning hernia and abdominal problems. Consequently, he sought the advice of Dr. Overcash concerning whether the claimant had any work restrictions. Dr. Overcash indicated that, as of 3/22/96, the claimant was allowed to work with no restrictions. Even though the authorized physician, Dr. Overcash, did not place any restrictions on the claimant, Mr. Becker indicated that the claimant still complained of pain while wearing the gunbelt and vest. Accordingly, Mr. Becker indicated that he initially made an accommodation for the claimant so he would not have to wear the gunbelt and vest.

Mr. Becker testified that the claimant was instructed not to respond to any police calls whatsoever, not to do any lifting or bending, and was not required to wear the gunbelt or vest. The claimant's responsibilities were primarily administrative in nature. He was to provide advice and guidance to other officers. Chief Becker agreed to these

accommodations in order to avoid injury to the claimant, members of the public or other officers.

Mr. Becker indicated that the claimant failed to follow specific orders concerning these work parameters on several occasions. As a result of the claimant's failure to abide by these orders, Chief Becker decided to take disciplinary action in the latter part of August or early September of 1996. Shortly thereafter, the claimant began to fail to show up for work.

Mr. Becker sought clarification from Dr. Overcash concerning the claimant's work restrictions. Upon learning that there were no restrictions after 3/22/96, Mr. Becker sent a letter to the claimant dated 9/19/96 with the instruction that the claimant should return to work full duty. Thereafter, Mr. Becker indicated that he received some information from Dr. Cerra which indicated that the claimant had been experiencing pain while wearing the gunbelt and vest, so Chief Becker indicated that he was willing to allow the claimant to continue to work in a light duty capacity, with hope that the claimant would eventually be able to return to work as a regular police officer. Nevertheless, the claimant did not contact Chief Becker or return to work thereafter.

The claimant testified that Mr. Becker appeared at his home on two occasions and berated him in front of his wife and children. He said that Chief Becker yelled at him when he went to the claimant's house some time in the early part of September 1996. Mr. Becker denied that there was anything improper about the two meetings at the claimant's home. Mr. Becker's testimony is supported by the testimony of the claimant's wife, who indicated that she did not remember Chief Becker speaking in a raised voice when he appeared at their home. Mrs. Gunter indicated that she was aware of the claimant's multiple surgeries prior to the 12/3/95 incident and confirmed that the claimant complained of pain in his abdomen prior to the 12/3/95 incident. All of this information provides competent and substantial evidence to support the position of the E/C that the incident of 12/3/95 is

not the major contributing cause of the problems or conditions experienced by the claimant during the period of time in question.

With regard to the claims for a psychiatric independent medical examination (IME) by Dr. Cerra and for authorization of psychiatric care, it is important to note the sequence of events. The claim for a psychiatric IME was included among the claims on a Petition for Benefits, dated 10/15/96, as well as being listed on the pre-trial stipulation form, which was signed on behalf of the Claimant on 12-30-96. Counsel for the Claimant acknowledged at the beginning of trial that no motion for IME had ever been filed, and that the request for a psychiatric IME had never been called for hearing prior to the date of trial. It is further significant that, upon request of the Employer/Carrier, the trial was continued from the originally scheduled date of 2-7-97 to 10-23-97. However, for reasons not fully explained before or at trial, no motion was filed and no request was ever made prior to the date of trial for any hearing or ruling on the request for a psychiatric IME. As in the case of Union Camp Corp. v. Hurst, 696 So. 2d 873 (Fla. 1st DCA 1997), the Claimant went on his own to see a physician (Dr. Cerra, a local psychiatrist) without seeking prior authorization, and then attempted to introduce testimony from that physician at trial. Again, although there was a request for a psychiatric IME on the pre-trial stipulation, no motion was filed and no request for ruling on that issue was made until the date of hearing. As stated by the appellate court in Union Camp:

> The claimant was under an affirmative obligation to request an IME under section 440.13(5)(e), Florida Statutes (Supp. 1994), by the physician of his choice, if he objected to the e/c's decision to controvert his request for benefits based upon the opinions rendered in the independent medical evaluations obtained by the e/c. (Citation omitted).

When the claimant in Union Camp attempted to introduce testimony from a health care provider who did not fall into one of the statutorily permitted categories listed in Section 440.13 (5) (e) of the Florida Statutes, the appellate court ruled that such witness could not properly testify, even though the panel noted that the claimant would have been "entitled to obtain such IME at the expense of the e/c" upon proper request. Similarly, in the present case, even if the claimant makes it known that he requests an IME, when the claimant does not seek a ruling on a request for IME prior to trial, and does not present good cause for the failure to do so, any such request must be considered to have been waived. Otherwise, the trial would have to be continued after all parties and witnesses had appeared at the forum, and the legislative intent to facilitate the "prompt and cost-effective delivery of payments" will be unnecessarily frustrated and delayed. Section 440.015, Fla. Stat. (Supp. 1994). See also Fla. R. Work. Comp. P. 4.075 (c) (1). It must be noted that this determination is limited to the particular facts presented herein; no wide-ranging policy statement should be inferred by the result in this proceeding. Had the facts been different, a different result might well have been reached.

Nevertheless, under the circumstances presented, I find that the request by the Claimant for a psychiatric IME has been waived by the failure to seek a ruling on that request prior to the date of trial. With that waiver, the objection of the E/SA to the testimony of Dr. Cerra must be sustained, and the medical opinions of Dr. Cerra must be excluded from consideration as he does not fall into a statutorily permitted category of medical witnesses. Without such testimony from Dr. Cerra, the record does not contain competent and substantial evidence to support a determination that the subject incident was the major contributing cause of any psychiatric injury; to support a determination by "clear and convincing evidence," to use the language of Section 440.09 (1) of the Florida Statutes, that any mental or nervous injury sustained by the Claimant was

compensable; or to support the claim for authorization of psychiatric care and treatment. Accordingly, the claims for such must be denied.

Alternatively, it appears from the evidence that the claimant did not begin to seek the care of a psychiatrist until after his conflict with Mr. Becker in late summer of 1996. He first began treating with Dr. Cerra on 9/10/96, which was prior to the filing of the Petition for Benefits dated 10/15/96 which sought authorization of psychiatric care and authorization for an IME with Dr. Cerra. Based upon the facts and the evidence, I find that there is competent and substantial evidence to support the position of the E/C that the subject incident is not, by clear and convincing evidence, the major contributing cause of the Claimant's need for authorization of a psychiatrist.

Section 440.09 (1) provides that "mental disorders or injuries occurring as a manifestation of an injury compensable under this section shall be demonstrated by clear and convincing evidence." It appears from the evidence that any need the claimant may have had for psychiatric care was the result of the disciplinary action taken against the claimant as opposed to being related to the 12/3/95 incident. Dr. Overcash indicated that the claimant did not need any psychiatric care as a result of the 12/3/95 incident. Although the medical opinion testimony of Dr. Domingo Cerra, psychiatrist, is not admissible, it appears that he did not have sufficient knowledge concerning all potential factors pertaining to the etiology of the claimant's psychiatric problems. Dr. Cerra could not differentiate which of the claimant's multiple prior surgeries had more of an effect on the claimant than any other. When asked if the claimant's psychiatric problems were related to the 12/3/95 incident, Dr. Cerra replied, "It may or may not. I don't know anything about the event in 1995. It may or may not. I don't have a clue. Until I get that information, I don't know how it rolls in here." I do not find clear and convincing evidence of

any mental or nervous injury occurring as a manifestation of a compensable injury as required by Section 440.09 (1).

Finally, the claimant is not entitled to PTD benefits unless the compensable injury incurred in the course and scope of employment is a "catastrophic" injury as defined by §440.02 (34), Florida Statutes (Supp. 1994). Bob Wilson Dodge v. Mohammed, 692 So. 2d 287 (Fla. 1st DCA 1997). Based upon the evidence, the claimant has failed to meet his burden of establishing that he has suffered a "catastrophic" injury, especially in light of the finding that Dr. Overcash released him to return to work without any permanent restrictions as a result of the subject injury. Indeed, there is a "complete absence of vocational evidence to suggest that claimant is unemployable or totally disabled due to physical limitations." Bishop v. Baldwin Acoustical and Drywall, 696 So. 2d 507 (Fla. 1st DCA 1997). "This case involves a failure of proof on the part of the claimant, the party in this case with the burden of proof." Bishop, 696 So. 2d at 512.

WHEREFORE, based upon the foregoing findings of fact, the following represent the conclusions of law for these proceedings:

1. The incident of 12/3/95 is compensable, but resulted in no permanent injury or permanent disability.
2. The claim for temporary partial disability (TPD) from 3/21/96 and continuing is denied.
3. The claim for permanent total disability (PTD) from 1/31/97 is denied.
4. Authorization of a psychiatrist is denied.
5. Authorization of a psychiatric IME is denied.
6. Interest, costs and attorney's fees are denied, except that the parties agreed for jurisdiction to be reserved as to whether there is entitlement to a fee and costs concerning the abdominal surgery which has already been provided.

DONE AND ORDERED in Chambers at Gainesville, Alachua County, Florida.

_S/_____
JONATHAN D. OHLMAN
JUDGE OF
COMPENSATION CLAIMS

THIS IS TO CERTIFY that on March 5th, 1998, the above Order was entered in the office of the Judge of Compensation Claims, and a copy was mailed to each party and counsel at the address listed above.

__s/_____
Judicial Assistant

APPENDIX "N"

Excerpt of Record of Hearing as to Petitioner Bryant before Hon. Jonathan D. Ohlman, Judge of Compensation Claims, held on September 9, 1997

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MR. STALEY: Yes, Your Honor. Specifically as to the deposition of Dr. Brooks, I would point out that that was under emergency circumstances. I would also assert that at least Dr. Brooks and the other records contained in his deposition as a totality contain observations in addition to lay opinion and that those observations would be admissible. I would also assert the lack of constitutionality of 440.13 (5) (e) on multiple grounds including violation of separation of powers, including violation of Article II and IV regarding fair trials, etcetera, etcetera, etcetera.

JUDGE OHLMAN: Okay. Just so we don't get off too far on that, my apology is that since the courts have held that a Judge of Compensation Claims is not empowered to adjudicate the constitutionality of the statute, that although I appreciate your raising it, there's no sense in either side arguing it because I can't make any findings--any binding determination of that. So, it is raised, but if need be it will have to be discussed at the --at the next level. (Transcript, p. 405-406)

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APPENDIX "O"

Order of Judge of Compensation Claims, Hon. Jonathan D. Ohlman, dated March 10, 1998, as to Petitioner Bryant

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STATE OF FLORIDA
DEPARTMENT OF LABOR AND
EMPLOYMENT SECURITY
OFFICE OF THE JUDGE OF
COMPENSATION CLAIMS
DISTRICT B

JEFF BRYANT,

Claimant,

Claim No. 261-29-2936
v. D/A 2-14-96
GOLDEN FLAKE and
LIBERTY MUTUAL INS. CO.

Employer

Michael B. Staley, Attorney for Claimant
Mark A. Massey, Attorney for Employer/Carrier

ORDER

Pursuant to due notice of Hearing, this matter came on for hearing before the undersigned at Ocala, Marion County, Florida on Tuesday, September 9, 1997. Present and representing the Employee was Michael B. Staley of Ocala, Florida. Present and representing the Employer/Carrier was Mark A. Massey of Ocala, Florida. With agreement of the parties, final consideration was delayed until February 27, 1998.

At the pre-trial or prior to this matter being submitted for determination, the parties, by counsel, arrived at the following stipulations:

1. That the undersigned Judge of Compensation Claims has jurisdiction of the subject matter and parties; and that venue is proper.

2. That sufficient notice of the accident and of the hearing was received by the respective parties.

3. That there was an employer/employee relationship on this date of accident sufficient for this employee to be covered pursuant to Chapter 440 of the Florida Statutes.

4. That the trial should be bifurcated in order to determine whether the Claimant sustained a compensable accident on 2-14-96. Should the evidence support a finding in favor of the Claimant, a subsequent hearing will be set to adjudicate all remaining issues in dispute.

It was the position of the Claimant that he sustained a work related injury on 2-14-96, and is entitled to certain workers' compensation benefits under Chapter 440 of the Florida Statutes. It was the position of the E/C that no compensable accident occurred, and that if it is determined that a compensable accident did occur, the Claimant's failure to give adequate notice of the incident precludes his right to benefits.

Testifying for the Claimant was the Claimant's wife, in addition to the Claimant. Testifying for the E/C were Charles Browning, Gerald Gueryn and Nellie Jones (live) and the Claimant (by deposition). In addition to the foregoing witnesses, there were several exhibits marked for evidence, each of which was identified on the record during of trial. Although I have reviewed all of the aforementioned evidence, I have not attempted to summarize or describe all of it in this order.

Based upon the foregoing stipulations and all of the evidence presented, I hereby make the following findings of fact:

1. I accept the stipulations of the parties and incorporate them by reference as if set out at length herein.

2. Jeff Bryant was born 6-21-55 and is a high school graduate with some college courses completed thereafter. The subject incident occurred on 2-14-96 when he was at work for Golden Flake as a maintenance man. He remembers talking to some co-employees and then found himself on the floor. The Claimant believes that he fainted or passed out, but he did not have any memory of the sequence of events prior to his awakening on the work room floor. When he arose, he felt nauseous and dizzy. He was taken to the Emergency Room and released. He attempted to return to work, but after going in for a few hours one day, the Claimant believed that, due to some continuing problems, he would be unable to continue so he resigned. Mr. Bryant also acknowledged that he suffered from Klippel-Feil syndrome, which was a pre-existing condition. According to the Claimant, this syndrome causes neck and shoulder pain as well as headaches. He had seen Dr. Martin Freed, an orthopedic specialist in Ocala, for more than a year for treatment of this condition. he had also received treatment prior to the accident from Dr. Ken Ng, an Ocala neurologist, and a Dr. Harmon in Gainesville.

3. The initial question is an evidentiary one. The Claimant sought to introduce deposition testimony from Dr. Joel Brooks and Dr. Jose Gaudier, who were the only two medical experts to testify in this case. When the Claimant attempted to introduce medical testimony from the aforementioned witnesses, the E/C raised a timely objection, asserting that neither of the witnesses was qualified to offer medical opinions in light of the limitations set out in Section 440.13(5)(e), Fla. Stat. (1995). The claimant responded by stating that the treatment

furnished by Dr. Brooks was done on an emergency basis, and by contending that the statutory limitation on presentation of medical testimony was unconstitutional. With regard to any constitutional arguments, I advised the parties that, as a judge of compensation claims, I could not adjudicate the constitutionality of a statute. Sasso v. Ram Property Management, 431 So. 2d 204 (Fla. 1st DCA 1983), approved on other grounds 452 So. 2d 932 (Fla. 1984), appeal dism'd 469 U. S. 1030, 105 S. Ct. 498 (1984). Therefore, any constitutional arguments would have to be presented to an appropriate forum.

4. As concerns the other arguments for admitting the medical opinions of these two witnesses, the circumstances in this case resemble those as reported in Union Camp Corp. v. Hurst, 696 So. 2d 873 (Fla. 1st DCA 1997), in which an injured worker went on his own to see a physician without seeking prior authorization, and then attempted to introduce testimony from such physician(s) at trial. In the present case, no motion for independent medical examination (IME) was filed prior to trial, and no request for ruling on that issue was made until the date of hearing. As stated by the appellate court in Union Camp:

> The claimant was under an affirmative obligation to request an IME under section 440.13(5)(e), Florida Statutes (Supp. 1994), by the physician of his choice, if he objected to the e/c's decision to controvert his request for benefits based upon the opinions rendered in the independent medical evaluations obtained by the e/c. (citation omitted)

When the claimant in Union Camp attempted to introduce testimony from a health care provider who did not fall into one of the statutorily permitted categories listed in section 440.13(5)(e) of the Florida Statutes, the appellate court ruled that such witness could not properly

testify, even though the panel noted that the claimant would have been "entitled to obtain such IME at the expense of the e/c" upon proper request. Similarly, in the present case, even if the claimant receives medical treatment in an emergency setting, and the e/c objects to the introduction of testimony from the physicians whose opinions the claimant seeks to have admitted into evidence, the claimant has an affirmative obligation to request an IME in a timely manner in order to qualify one or more physicians to express opinions on the issue in dispute. When the claimant does not seek a ruling on a request for IME prior to trial, and does not present good cause for the failure to do so, any such request must be considered to have been waived, if the guidelines set out in Union Camp are to be followed. Otherwise, the trial would have to be continued after all parties and witnesses had appeared at the forum, and the legislative intent to facilitate the "prompt and cost-effective delivery of payments" will be unnecessarily frustrated and delayed. Section 440.015, Fla. Stat. (Supp. 1994). See also Fla. R. Work. Comp. P. 4.075 (c) (1). I would also note that the trial was already continued one time, with the concurrence of the Claimant, from June 10, 1997 to September 9, 1997. It should also be noted that this determination is limited to the particular facts presented herein; no wide-ranging policy statement should be inferred by the result in this proceeding. Had the facts been different, a different result might well have been reached. Finally, this decision seems to be required because of the appellate court's decision in the Union Camp case in the context of what medical testimony is properly admissible. I am unaware of, and was not cited to, any cases in which medical opinions were deemed admissible under circumstances substantially similar to the ones presented herein.

5. Without either Dr. Brooks or Dr. Gaudier qualified as an independent medical examiner, and as neither physician fits the other criteria in Section

440.13(5)(e), Fla.Stat. (1995), there is no medical opinion testimony to support the claimant's position on causation. Because the injury to the Claimant is not readily observable, such expert testimony is required. Vero Beach Care Center v. Ricks, 476 So. 2d 262 (Fla. 1st DCA 1985). This requirement is even more crucial when there is evidence of a pre-existing or idiopathic condition, as is the case here. Therefore, there is an absence of competent and substantial evidence which was tendered.

6. In arriving at these determinations, I have considered all of the evidence, have evaluated the candor and demeanor of those witnesses who appeared live before me, have resolved all conflicts in the evidence and have rejected all evidence and inferences that may be inconsistent with these findings and determinations. However, the decision here was based primarily on the legal reasons set forth above.

WHEREFORE, based upon the foregoing findings of fact, the following represents the conclusions of law for these proceedings:

1. The Petition for Benefits must be, and is hereby, denied and dismissed.

DONE AND ORDERED at Gainesville, Alachua County, Florida this 10th day of March, 1998

s/_____
JONATHAN D. OHLMAN
JUDGE OF COMPENSATION CLAIMS

I hereby certify that the foregoing order was entered on the 10th day of March, 1998, and that a conformed copy was sent on that date by U. S. Mail to the parties and counsel of record at their record addresses.

_____/s_____
SECRETARY TO JUDGE OHLMAN

Supreme Court, U.S.
FILED
SEP 13 1999
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No. 99-298

In The

Supreme Court of the United States

WILLIAM GUNTER,

Petitioner,

vs.

CITY OF BELLEVIEW, FLORIDA and FLORIDA LEAGUE OF CITIES,

Respondents.

On Petition For Writ Of Certiorari To The District Court Of Appeal, First District State Of Florida

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW (RESTATED)

I. WHETHER § 440.15 FLA. STAT. (1994) VIOLATES THE DUE PROCESS, EQUAL ACCESS TO COURTS AND EQUAL PROTECTION OF LAWS PROVISIONS OF THE CONSTITUTION

II. WHETHER § 440.45(2), FLA. STAT. (1994) IS AN UNCONSTITUTIONAL VIOLATION OF SEPARATION OF POWERS

III. WHETHER § 440.13(5)(e) FLA. STAT. (1994) IS UNCONSTITUTIONAL IN ITS RESTRICTION OF MEDICAL TESTIMONY

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BASIS OF JURISDICTION

Petitioner alleges that the Florida Supreme Court no longer has jurisdiction for common law certiorari. However, Florida Rule of Appellate Procedure 9.030(a)(3) entitled, "Original Jurisdiction," states in pertinent part:

> "The Supreme Court may issue writs of prohibition to Courts and all writs necessary to the complete exercise of its jurisdiction . . . "

Respondents the City of Belleview, Florida and the Florida League of Cities further note the concession by counsel for Petitioner Gunter that Petitioner's appeal to the 1st District Court of Appeal for the State of Florida resulted in a unanimous, *per curiam* decision rendered April 12, 1999, unpublished. (Petition, p. 1). Petitioner Gunter also concedes that his Motion for Rehearing to the 1st DCA was denied by Order dated May 4, 1999, also without written opinion and unpublished. Thus there is no appellate opinion for this Honorable Court to review, since no written opinion accompanied either of those decisions by the 1st District Court of Appeal of Florida in this workers' compensation claim and appeal.

Nevertheless, Petitioner alleges this Honorable Court's jurisdiction under 28 U.S.C. § 1257, which Respondents dispute, given the lack of appellate opinions below for this Honorable Court to analyze.

STATEMENT OF THE CASE

Respondents accept the Statement of the Case set forth in the Petition, noting Petitioner Gunter's concession that the 1st District Court of Appeal of Florida unanimously affirmed the Order of the Judge of Compensation Claims without opinion, and similarly denied Petitioner's Motion for Rehearing. (Petition, p. 7).

ARGUMENT

I. WHETHER § 440.15 FLA. STAT. (1994) VIOLATES THE DUE PROCESS, EQUAL ACCESS TO COURTS AND EQUAL PROTECTION OF LAWS PROVISIONS OF THE CONSTITUTION

Each of the Petitioner's three arguments on appeal attack the constitutionality of various amended provisions of Chapter 440, Florida Statutes. The first statute of Florida's workers' compensation laws to be attacked is section 440.15, *Fla. Stats.* (1994). Petitioner Gunter argues that the statute as amended violates the due process, equal access to Court, and equal protection provisions of the Constitution.

Florida's 1st District Court of Appeal has primary appellate jurisdiction over workers' compensation appeals in that state. It has held on multiple occasions that *Fla. Stat.* 440.15 as amended in 1994 does not violate the constitutional right of access to Courts. See, i.e. *Bradley v. Hurricane Restaurant,* 677 So. 2d 162 (Fla. 1st DCA 1996).

The State Legislature has the power to enact workers' compensation laws even *without* specific constitutional authorization provided the constitutional limitations are not violated. The Florida Supreme Court has held that it is within the power of the State Legislature to provide for a workers' compensation system which "supersedes" any other legislation effecting injuries suffered on the job, in an opinion appealed to this Honorable Court. *Mullarkey v. Florida Feed Mills, Inc.*, 268 So. 2d 363 (Fla. 1972), *appeal dismissed*, 411 U.S. 944, 36 L. Ed. 2d 406, 93 S. Ct. (1973).

The Florida Supreme Court has held that the exclusive remedies afforded under the state's workers' compensation laws to those injured on the job are appropriate and in compliance with the requirements of due process and equal protection of the laws. *Hughes v. B.F. Goodrich Co.*, 11 So. 2d 313 (Fla. 1943). The legislative statutes are presumed valid, and Petitioner Gunter has failed to carry the burden of demonstrating otherwise in this Petition.

Florida Courts, like virtually all Courts around the country, have approved the "necessary exchange" inherent in the workers' compensation laws. The employees trade any common law remedy for a " . . . sure, expeditious method of settling claims." *John v. G.D.G. Services, Inc.*, 424 So. 2d 114 (Fla. 1st DCA 1982), *aff'd*, 440 So. 2d 1286 (Fla. 1983).

But Petitioner argues that the amount of benefits provided in *Fla. Stat.* 440.15 (1994) is so diminished that it effectively eliminates the rights of the worker when weighed against the benefit to the employer. Yet Petitioner fails to demonstrate or otherwise prove how the

1994 amendments to *Fla. Stat.* 440.15 cause the benefits to be "effectively eliminated."

Instead, Petitioner simply argues in general terms that the reduction of benefits available somehow abolishes one side of the trade-off that exists in the employer-employee relationship under the workers' compensation statutes. Petitioner gives no grounds for that bald allegation, merely stating generally that the statute somehow destroys the balance of power and shifts the weight so predominantly to the side of the employer that it unconstitutionally denies the employee access to the Courts.

But the employees *are* granted automatic access to the Courts through the workers' compensation system, and have no burden of proof on liability or fault whatsoever. The employer gives up all rights to prove that the majority of work place accidents were the employees' fault in whole or in part. Instead, the employer is responsible for the automatic provision of fully-paid medical treatment and a substantial percentage of the employee's lost income, without regard to fault whatsoever.

The 1994 amendments to Chapter 440, *Florida Statutes,* do not change this fundamental underpinning of the workers' compensation system one iota. Nor does Petitioner Gunter explain in any manner any error in the conclusion by the Judge of Compensation Claims that Petitioner's December 1995 job accident did not result in any permanent physical injury or incapacity. (See, Petitioner's Appendix "D"). Nor does Petitioner Gunter provide any basis to attack the Judge's conclusion that he returned to work with no physical restrictions and thus was not entitled to partial disability benefits thereafter

nor suffered any permanent impairment to entitle him to permanent total disability benefits. (Appendix "D").

Thus Petitioner Gunter argues the unconstitutionality of the 1994 amendments to certain portions of Chapter 440, *Florida Statutes,* in a vacuum. Petitioner's lack of entitlement to benefits was not due to any unconstitutional aspect of the amended statutes, but instead to the clear lack of evidence in support of his claims. His simple inability to prove entitlement to further benefits beyond those already paid under any provision of Chapter 440 eliminates any valid attack on the constitutionality of these statutes that he could attempt to raise.

Even if Petitioner Gunter could argue unconstitutionality with any validity, that argument would fail. The well-reasoned opinions of the Florida Supreme Court and First District Court of Appeal in appeals based on constitutional attacks have reconfirmed the State Legislature's right to create a workers' compensation system which trades employees' potential tort remedies against the employer for no fault, immediate relief for medical bills and lost wages. The Petitioner's argument here is thus made up solely of generalities and form, with no content.

The Florida Supreme Court has previously held that even though an amendment to a provision of Chapter 440 may render an injured employee less eligible for benefits then under a prior version of the State's workers' compensation laws, the amendments still do not violate the right of access to the Courts. *Martinez v. Scanlan,* 582 So. 2d 1167 (Fla. 1991). As long as the workers' compensation laws remain a reasonable alternative to tort litigation, constitutional rights to equal access, equal

protection and due process are not violated. *See also, Mahoney v. Sears, Roebuck & Co.*, 440 So. 2d 1285 (Fla. 1983); *Acton v. Fort Lauderdale Hospital*, 440 So. 2d 1282 (Fla. 1983).

Obviously, the Florida Courts are not unmindful of the constitutional analysis of workers' compensation laws. Petitioner Gunter's arguments, however, attack the original basis for the creation of workers' compensation laws around the country, without any reference to the utter lack of evidentiary support for his workers' compensation claim below. Mr. Gunter was denied further workers' compensation benefits beyond those already paid because there was no evidence in support of his claim, not because any statute in Chapter 440 was unconstitutional in any manner.

Petitioner Gunter should make his arguments to his local state legislator, not to this Honorable Court. The Florida Appellate Courts have upheld the 1994 amendments to the State's workers' compensation laws from constitutional challenge. *Bradley, supra.* Petitioner Gunter urged the Florida Appellate Courts in his case to recede from those decisions and find the statute unconstitutional, without any concrete basis or competent evidence for his request. Lacking such substantive ground for constitutional attack, Petitioner Gunter's demand for this Honorable Court's review and reversal of the opinions of the Florida Appellate Court should be DENIED.

II. WHETHER § 440.45(2), FLA. STAT. (1994) IS AN UNCONSTITUTIONAL VIOLATION OF SEPARATION OF POWERS

On this Point on Appeal, Petitioners baldly argue the unconstitutionality of the Florida Statute authorizing the governor to appoint Judges of Compensation Claims. *Fla. Stat.* 440.45. In the interest of brevity, Respondents will not repeat but reincorporate as if fully set out herein their prior arguments in this brief in response to the baseless constitutional challenges in this appeal.

The Florida Supreme Court previously upheld the constitutionality of the majority of the amended statute, but held unconstitutional only that provision which *eliminated* the governor's right to choose whether to reappoint judges. *Jones v. Lawton Chiles,* 638 So. 2d 48 (Fla. 1994). The Court found that the limited portion of *Fla. Stat.* 440.45(2) that eliminated the governor's choice in the reappointment of a JCC was invalid because it,

> " . . . unconstitutionally encroaches on the power of the governor to appoint executive branch officers." *Id.* at 48.

Since the Judges of Compensation Claims come under the Workers' Compensation Division of the Department of Labor in Florida, they are directly within the *executive* branch of government. *Id.* at 50. Inherent in the Governor's "direct supervisory authority" over the executive branch is the power to appoint or reappoint executive officers such as these judges. *Id.* Since the *Legislature* chose to place the JCC's within the executive branch as part of the Department of Labor, the constitutional "balance of powers" is met by this system and its

fairness is patent. *Id.* The judicial branch of government, represented by the District Court of Appeal and the Florida Supreme Court, serves as the appellate monitor of the executive branch JCC's. *Id.*

Thus the Petitioner's argument that this system is somehow unconstitutional not only lacks merit, but like his other arguments has nothing to do with the record evidence in support of the decision by JCC Ohlman in his claims. The Petitioner's specious arguments that he is entitled to a Judge who is independent and not serving at the pleasure of the Governor are meritless, and an insult to the integrity of JCC Ohlman and all other Judges of Compensation Claims.

Petitioner's arguments have no relationship to his claims or to the JCC's ultimate decision on the workers' compensation claims. In that context, Respondents respectfully submit that the Petition filed herein should be DENIED.

III. WHETHER § 440.13(5)(e) FLA. STAT. (1994) IS UNCONSTITUTIONAL IN ITS RESTRICTION OF MEDICAL TESTIMONY

In the interest of brevity, Respondents will not repeat but reincorporate as if fully set out herein their prior arguments against Petitioner Gunter's constitutional challenges in this appeal. The attack in Point III on the constitutionality of *Fla. Stat.* 440.13(5)(e) as amended in 1994 is similarly vague and unsupported, and should also fail.

Petitioner Gunter wholly ignores the evidentiary context in which his workers' compensation claims below were denied. Petitioner Gunter and counsel wholly failed to comply with simple procedural requirements in seeking authorization for the psychiatric care of Dr. Cerra. The simple failure to request an IME or medical care from a certain physician, coupled with the failure to present good cause for not having done so, waived any request for alternative care and excluded the testimony of such physician. *Union Camp Corp. v. Hurst*, 696 So. 2d 873 (Fla. 1st DCA 1997).

Surely that does not violate due process or equal protection rights, to simply require a litigant to follow clear and well-known procedural steps. The failure of Petitioner Gunter and counsel to follow the simple rules impeded the legislative intent to facilitate the "prompt and cost-effective delivery of payments." *Id.*

Nothing in Petitioner's arguments on this Point demonstrates any error in the Judge of Compensation Claims' findings of fact and ultimate conclusions in the benefit denial Order. Nor does it demonstrate in any manner the unconstitutionality of *Fla. Stat.* 440.13(5)(e).

In *Rucker v. City of Ocala*, 684 So. 2d 836 (Fla. 1st DCA 1996), that Court held that a Florida claimant's constitutional rights to due process, equal protection and access to Courts are *not* violated by this statute's provisions barring medical testimony from unauthorized physicians. As the Appellate Court specifically stated, the provisions of Chapter 440 allow a claimant to pursue "available

alternative methods" of obtaining medical care and introducing opinions from those experts, by simply following procedural steps. *Id.* at 840.

As long as the Claimant has the right to notice and an opportunity to be heard, his rights to procedural due process are met. *Id.* As long as the classifications created by the workers' comp statutes "rationally advance legitimate governmental objectives," then a Claimant's constitutional rights of equal protection and access to the Courts are met. *Id.* at 843. *See also, Strohm v. Hertz Corp.*, 685 So. 2d 37 (Fla. 1st DCA 1996).

Despite Petitioner Gunter's attempt to fit his arguments on constitutionality into the actual evidence in his case, the arguments fail in their entirety. Simply put, this Claimant failed to follow a simple statutory formula for seeking alternative medical care and insuring that testimony from the alternative health care provider be admissible in a future hearing. Having failed to do so, and having wholly failed to demonstrate the unconstitutionality of the legislative classifications established under the 1994 amendments to *Fla. Stat.* 440.13(5)(e), Petitioner Gunter's argument on this point should be DENIED.

CONCLUSION

For all the reasons stated herein or to be gleaned from a review of the documents in the Appendix to the *Petition for Writ of Certiorari,* Respondents the City of Belleview, Florida Police Department and the Florida League of Cities respectfully submit there is no merit

whatsoever in the constitutional arguments on appeal made by the Petitioners herein.

The Petitioners having wholly failed to demonstrate any error in the Judge of Compensation Claim's ultimate findings of fact and conclusion of law as reflected in the Orders on appeal, and failed to demonstrate any support for the alleged unconstitutionality of certain provisions of Chapter 440, *Florida Statutes* (1994), the *Petition for Certiorari* filed herein should be DENIED.

Respectfully submitted,

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No. 99-298

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In The

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JEFF BRYANT,

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GOLDEN FLAKE SNACK FOODS, INC. and LIBERTY MUTUAL INSURANCE CO.,

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WILLIAM GUNTER,

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CITY OF BELLEVIEW and FLORIDA LEAGUE OF CITIES,

Respondents.

On Petition For Writ Of Certiorari To The District Court Of Appeal, First District State Of Florida

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether section 440.13, Florida Statutes (Supp. 1994), which governs the medical witnesses who may testify under the Florida Workers' Compensation Law, violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, and the redress of grievances clause of the First Amendment to the United States Constitution?

2. Whether the Governor's power to appoint and dismiss administrative judges under the Florida Workers' Compensation Law violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, and the redress of grievances clause of the First Amendment to the United States Constitution?

3. Whether the available benefits for injured workers under Florida's Workers' Compensation Law are "an illusory substitute" for the constitutional right of access to courts in violation of the First and Fourteenth Amendments to the United States Constitution?

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§ 440.45, Fla. Stat. (Supp. 1994) 1, 2, 11, 12

§ 440.45(2)(c), Fla. Stat. (Supp. 1994) 11

STATEMENT OF THE CASE

The Proceedings Below

At the trial court level, Petitioner Bryant sought benefits for an on-the-job injury by filing a claim for benefits under the Florida Workers' Compensation Law. (Petitioners' Brief at 5). Petitioner Bryant sought to introduce medical testimony of two physicians, neither of which was qualified to offer medical opinions, in light of the limitations set out in section 440.13(5)(e), Florida Statutes (Supp. 1994). (Petitioners' App. O). The Judge of Compensation Claims (JCC) did not allow the medical testimony, and Petitioner Bryant's claim for benefits was denied. *Id.*

On appeal to the First District Court of Appeal for the State of Florida, Petitioner Bryant contended that section 440.13(5)(e), Florida Statutes (Supp. 1994), unconstitutionally denied him access to the courts, due process of law, and equal protection of the law, as provided in Article I, sections 2, 9, and 21 respectively, of the Florida Constitution. (Petitioners' Brief at 5). Petitioner Bryant also contended that section 440.15, Florida Statutes (Supp. 1994), which addresses benefits available under the Florida Workers' Compensation Law, violated Article I, sections 2 and 9 of the Florida Constitution. *Id.* Petitioner Bryant further asserted that section 440.45, Florida Statutes (Supp. 1994), which gave the Governor sole power to appoint JCCs, violated the separation of powers provision of Article II, section 3, Florida Constitution and the due process provision of Article I, section 9, Florida Constitution. *Id.* at 6. The order of the JCC was *per curiam* affirmed without written opinion by the First District

Court of Appeal (Petitioners' App. B) and Petitioners' Motion for Rehearing was denied on May 3, 1999. (Petitioners' App. C).

Like Petitioner Bryant, Petitioner Gunter also sought benefits at the trial court level for an on-the-job injury by filing a claim for benefits under the Florida Workers' Compensation Law. (Petitioners' Brief at 6). Petitioner Gunter sought to introduce two depositions of a physician who was not qualified to offer medical opinions in light of the limitations set out in section 440.13(5)(e), Florida Statutes (Supp. 1994). (Petitioners' App. M). The JCC did not allow the medical testimony, and Petitioner Gunter's claim for benefits was denied. *Id.*

On appeal to the First District Court of Appeal for the State of Florida, Petitioner Gunter contended that section 440.13(5)(e), Florida Statutes (Supp. 1994), unconstitutionally denied him access to the courts, due process of law, and equal protection of the law, as provided in Article I, sections 2, 9, and 21 respectively, of the Florida Constitution. (Petitioners' Brief at 6). Petitioner Gunter also contended that section 440.15, Florida Statutes (Supp. 1994), which addresses benefits available under the Florida Workers' Compensation Law, violated Article I, sections 2 and 9 of the Florida Constitution. *Id.* Petitioner Gunter further asserted that section 440.45, Florida Statutes (Supp. 1994), which gave the power of appointment of JCCs to the Governor, violated the separation of powers provision of Article II, section 3, Florida Constitution, and the due process provision of Article I, section 9, Florida Constitution. *Id.* at 7. The Order of the JCC was *per curiam* affirmed without written opinion by the First

District Court of Appeal (Petitioners' App. E) and Petitioners' Motion for Rehearing was denied on May 4, 1999. (Petitioners' App. F).

REASONS FOR DENYING THE WRIT

I. The Federal Claims for Which Petitioner Seeks Certiorari Were Never Addressed or Properly Presented to the State District Court of Appeal.

Because the First District Court of Appeal for the State of Florida issued *per curiam* affirmances in the proceedings below, petitioners have no right under Florida law to call upon the Florida Supreme Court for review by way of certiorari. Fla. Const. art. V, § 3. Under these circumstances, the First District Court of Appeal becomes the highest court in Florida wherein a "decision could be had." *See Nash v. Florida Indus. Commission*, 389 U.S. 235 (1967); 28 U.S.C. § 1257(a). Petitioners thus seek to invoke the Court's jurisdiction under 28 U.S.C. § 1257 (Petitioners' Brief at 2).

Under 28 U.S.C. § 1257(a), "[f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. . . . " With "very rare exceptions," the Court has "adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [the Court] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state

court that rendered the decision [the Court has] been asked to review." *Adams v. Robertson*, 117 S.Ct. 1028, 1029 (1997). "When the highest state court is silent on a federal question before [the Court], [the Court] assume[s] that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption." *Id.* If federal questions were not timely and properly raised below, this Court is without jurisdiction. *Webb v. Webb*, 451 U.S. 493, 495 (1981) (dismissing a writ of certiorari for want of jurisdiction where petitioner had only referred to state law and not the United States Constitution anywhere in the state court proceedings).

In the proceedings below, petitioners challenged specific provisions of the Florida Workers' Compensation Law as violative of the Florida Constitution. (Petitioners' Brief at 5-7). At no point before filing the Petition for Writ of Certiorari did petitioners challenge the workers' compensation provisions as violative of the United States Constitution. *Id.* Respondent acknowledges that Florida's constitutional provisions regarding due process of law, equal protection, and access to courts are similar to their counterparts in the United States Constitution. (Petitioners' Brief at 14-15). Nevertheless, for petitioners to establish and preserve their challenges to the workers' compensation provisions as violative of the United States Constitution, they should have raised such challenges in the proceedings below. Accordingly, this Court should follow its consistent refusal to decide federal constitutional issues raised here for the first time on review of state court decisions. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *see also Tacon v. Arizona*, 410 U.S. 351, 353

(1973); *Hill v. California*, 401 U.S. 797, 805 (1971); *Street v. New York*, 394 U.S. 576, 582 (1969).

II. Section 440.13, Florida Statutes (Supp. 1994), Which Governs the Medical Witnesses Who May Testify in a Workers' Compensation Case, Does Not Violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution or the Redress of Grievances Clause of the First Amendment to the United States Constitution.

Petitioners challenge section 440.13, Florida Statutes (Supp. 1994), which governs the medical witnesses who may testify in a workers' compensation case, as an unconstitutional denial of procedural due process, a violation of equal protection rights, and a violation of the right to petition the government for redress of grievances. (Petitioners' Brief at 8-9). Previously, in *Rucker v. City of Ocala*, 684 So. 2d 836, 841 (Fla. 1st DCA 1996), the First District Court of Appeal expressly rejected similar constitutional challenges to section 440.13, Florida Statutes (Supp. 1994) (holding that section 440.13(5)(e), Florida Statutes, does not violate the state constitution's provisions on due process, equal protection, or access to courts). Because this Court accords "respectful consideration and great weight to the views of the State's highest court," it should also reject petitioners' meritless attacks on the constitutional validity of section 440.13, Florida Statutes (Supp. 1994). *General Motors v. Romein*, 503 U.S. 181, 187 (1992).

A. Procedural Due Process:

Procedural due process imposes constraints on governmental decisions that deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments to the United States Constitution. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). In the state of Florida an injured employee's right to receive workers' compensation benefits qualifies as such a property interest. *See De Ayala v. Florida Farm Bureau Casualty Ins. Co.*, 543 So. 2d 204, 206 n. 6 (Fla. 1989) (Analyzing an equal protection claim, the court stated, "[I]n the sense that the workers' compensation system replaced other rights formerly afforded to workers, we cannot agree with the district court that workers' compensation is entirely in the nature of a privilege."). Therefore, an injured employee's right to receive workers' compensation as a property right must be protected by minimum procedural safeguards including notice and an opportunity to be heard. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' ").

To determine what procedural due process is to be afforded workers' compensation claimants, it should first be noted that due process, "unlike some legal rules, is not a technical conception with fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). Instead, due process "is flexible and calls for such procedural protections as the particular situation demands." *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972); *Walters v. National Ass'n of Radiation*

Survivors, 473 U.S. 305, 326 (1985) ("legislatures are to be allowed considerable leeway to formulate such processes without being forced to conform to a rigid constitutional code of procedural necessities"). In an administrative setting, procedural due process does not always require application of the judicial model. *Dixon v. Love*, 431 U.S. 105, 115 (1977); *Mathews*, 424 U.S. at 348 ("[D]ifferences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of the courts.' "). In fact, because workers' compensation proceedings are administrative in nature, less stringent formalities are needed to satisfy due process concerns. *Rucker*, 684 So. 2d at 841.

The Florida Workers' Compensation Law provides sufficient procedural protections to injured workers seeking to admit medical testimony in support of their claims for benefits. *See generally Rucker*, 684 So. 2d at 840-842. Under section 440.13(5)(e), Florida Statutes (Supp. 1994), for a medical opinion to be admissible in a proceeding before the judge of compensation claims (JCC), it must come from one of three sources: (1) a medical advisor appointed by the JCC; (2) an independent medical examiner; or (3) an authorized treating provider. Sections 440.13(1)(j) and 440.13(5)(a), Florida Statutes (Supp. 1994), unequivocally state that an independent medical examiner may be selected by either the employee or the insurance carrier. If an employee objects to an employer/carrier's decision to controvert his or her request for benefits based upon the opinions rendered in the independent medical examination obtained by the employer/carrier, the employee is under an affirmative obligation to

request an independent medical examination under section 440.13(5)(a), Florida Statutes (Supp. 1994). *Union Camp Corp. v. Hurst*, 696 So. 2d 873, 875 (Fla. 1st DCA 1997). When an employee makes a specific request for treatment by an independent medical examiner and the employer/carrier does not provide the treatment within a reasonable time period, the employee may obtain such treatment at the expense of the employer/carrier, if the treatment is compensable and medically necessary. § 440.13(2)(c), Fla. Stat. (Supp. 1994). The Florida Workers' Compensation Law thus allows an injured employee to choose whatever independent medical examiner he/she wants, and forces the employer/carrier, rather than the employee, to pay for the independent medical examination. *Id.* Moreover, the statute does not preclude award of an attorneys' fee to injured employees who seek an independent medical examination then incur attorneys' fees due solely to an employer/carrier's delay or opposition to the independent medical examination. *Richardson v. Showell Farms*, 734 So. 2d 590, 592 (Fla. 1st DCA 1999).

In the proceedings below, petitioners filed no motions prior to trial requesting independent medical examinations, nor did they seek any rulings requesting independent medical examinations prior to trial. (Petitioners' App. M & O). Instead, petitioners chose to seek out treatment without first requesting independent medical examinations. *Id.* At trial, petitioners did not even present good cause for their failure to first request independent medical examinations as required by law. *Id.* As a result, the JCC did not allow testimony by the unauthorized physicians, and denied petitioners' respective claims for benefits. *Id.* Petitioners have also made no

showing that their requests for independent medical examinations would have been denied had petitioners properly requested them. *Id.* Petitioners' inability to admit supportive medical testimony arose solely from their own failure to comply with established procedure, not from a constitutionally defective procedural system.

B. Right to Petition the Government for Redress of Grievances:

Petitioners also assert that section 440.13, Florida Statutes (Supp. 1994), violates their First Amendment right to petition the government for redress of grievances. (Petitioners' Brief at 9). Workers' compensation statutes represent outgrowths and modifications of basic tort law. *Weber v. Aetna Casualty & Surety Co. et al.*, 406 U.S. 164, 171 (1972). The Florida Workers' Compensation Law (like other states' workers' compensation statutes) has removed difficult obstacles to recovery in work-related injuries by offering a more certain, though generally less remunerative, compensation. *Id.* at 172. While the Florida Workers' Compensation Law abolished the right to sue one's employer in tort for a job-related injury, it provided "adequate, sufficient, and even preferable safeguards for an employee who is injured on the job." *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).

Although section 440.13(5)(e), Florida Statutes (Supp. 1994), does restrict the medical witnesses an injured employee may use to prove entitlement to workers' compensation benefits, it by no means eliminates an injured employee's cause of action altogether. *See Rucker*, 684 So. 2d at 843 (Fla. 1st DCA 1996). Therefore, the statute does

not deprive petitioners of their right to petition the government for redress of grievances.

C. Equal Protection:

Petitioners further contend that section 440.13, Florida Statutes (Supp. 1994), violates the equal protection clause of the Fourteenth Amendment. (Petitioners' Brief at 9). To violate the equal protection clause, however, section 440.13, Florida Statutes (Supp. 1994), would have to treat differently those falling within its purview. *See Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 152 (1980) (declaring unconstitutional a provision of Missouri's workers' compensation statute mandating gender-based discrimination); *see also Weber*, 406 U.S. at 165 (holding that the Equal Protection Clause of the Fourteenth Amendment had been violated where dependent unacknowledged illegitimate children were denied equal recovery rights as compared to other children under Louisiana's workers' compensation laws). Petitioners make no such allegation. (Petitioners' Brief at 9). Instead, petitioners contend that section 440.13, Florida Statutes (Supp. 1994), imposes restrictions on access to evidence for "only one class of litigants, the injured worker." *Id.*

The "injured worker" is the only class of litigant the Florida Workers' Compensation Law was intended to govern. § 440.015, Fla. Stat. (Supp. 1994). From its inception, the Florida Workers' Compensation Law was intended "to assure the quick and efficient delivery of disability and medical benefits to [all] injured worker[s]." The tests to determine the validity of state statutes under the Equal Protection Clause require, at a minimum, that a

statutory classification bear some rational relationship to a legitimate state purpose. *Weber*, 406 U.S. at 172. Moreover, social legislation, such as a workers' compensation act, is generally subject to a rational relationship analysis. *Strohm v. Hertz Corp./Hertz Claim Management*, 685 So. 2d 37, 39 (Fla. 1st DCA 1996) (citing *B & B Steel Erectors v. Burnsed*, 591 So. 2d 644, 647 (Fla. 1st DCA 1991)). The State of Florida's interest in providing "quick and efficient delivery" of benefits surely bears a rational relationship to the establishment of a system under which *all* injured workers are treated equally.

III. Although They Perform a Quasi-Judicial Function, Judges of Compensation Claims (JCCs) Are Executive Branch Officials Properly Appointed and Removed By the Governor.

Under section 440.45, Florida Statutes (Supp. 1994), the power to appoint and remove Judges of Compensation Claims ("JCCs") is vested with the Governor. Petitioners contend that the impartiality of JCCs is jeopardized by the Governor's ability to remove JCCs "for cause" before expiration of the JCCs' four-year terms. (Petitioners' Brief at 10-11); § 440.45(2)(c), Fla. Stat. (Supp. 1994). Relying on this unproven assumption, petitioners argue that their constitutional rights have been violated. (Petitioners' Brief at 11).

JCCs are *executive* branch officials, not *judicial* branch officials. *Jones v. Chiles*, 638 So. 2d 48, 50 (Fla. 1994). Although JCCs perform a quasi-judicial function, the Florida Supreme Court has repeatedly acknowledged that JCCs are still members of the executive branch. *See id.*; *see*

also Scholastic Systems, Inc. v. Leloup, 307 So. 2d 166, 170 (Fla. 1974). Specifically, JCCs fall under the Workers' Compensation Division of the Department of Labor and Employment Security, one of the twenty-five *executive departments* provided for in Article VI, section 6, of the Florida Constitution. *See* § 440.45, Fla. Stat. (Supp. 1994). As holder of the chief executive office in which the supreme executive power is vested, the Governor has direct supervision over all executive departments unless the legislature places that supervision in the hands of one of the following other executive officers: the Lieutenant Governor, a cabinet member, or an officer or board appointed by and serving at the pleasure of the Governor. Fla. Const. art. IV, §§ 1(a), 6. Inherent in that direct supervisory authority is the power to appoint and remove executive officers from public office. *Jones*, 638 So. 2d at 50.

Under section 20.171, Florida Statutes (1998), the Department of Labor and Employment Security is under the direct supervision of the Secretary of Labor and Employment Security, an officer appointed by and serving at the pleasure of the Governor. Therefore, only the Governor or the Secretary of Labor and Employment Security, subject to the Governor's approval, has the power to appoint JCCs. *Jones*, 638 So. 2d at 50. The only restriction that may be placed on the Governor's appointment power is that confirmation by the Senate or approval of three members of the cabinet may be required by law. Fla. Const. art. IV, § 6(a). By unequivocally vesting the appointment and removal power of JCCs in the Governor, the state legislature has expressly chosen

to place JCCs and the adjudication of workers' compensation claims within the executive branch. *Jones*, 638 So. 2d at 53. Moreover, no statutory or constitutional provision exists under Florida law to prohibit the legislature from placing workers' compensation claims within the jurisdiction of the county or circuit courts, should it choose to do so. *Id.*

Nevertheless, petitioners question the legislature's actions by broadly asserting that such "unfettered discretion" in the Governor influences the JCC's impartiality. (Petitioners' Brief at 10-11). Petitioners argue that "a JCC who approved too many IME [independent medical examination] requests by injured workers ***could*** legally be removed 'for cause' ***if*** the Governor felt so many IME approvals [were] 'encouraging needless litigation' . . . " *Id.* at 10 (emphasis added). Likewise, petitioners suggest that "***any*** JCC who is too sympathetic to the plight of injured workers is subject to political removal by ***a*** governor who tires of complaints from wealthy insurance companies." *Id.* (emphasis added). Nowhere do petitioners offer specific proof, however, that such impartiality has actually occurred. Petitioners' argument must fail because it relies on the unproven assumption that the Governor of the State of Florida is aligned with insurance companies against injured workers. Moreover, petitioners never even requested that an independent medical examiner be appointed in their workers' compensation cases, and therefore, they suffered no harm as a result of the independent medical examination provision.

IV. Petitioners' Challenges to the Benefits Available Under the Florida Workers' Compensation Law Are Not Ripe and Are Unsound.

Petitioners contend that "systematic" and "dramatic" reductions in the benefits available to injured workers under the Florida Workers' Compensation Law make it an "illusory substitute" for the constitutional rights of access to courts in violation of the First and Fourteenth Amendments to the U.S. Constitution. (Petitioners' Brief at 11-14). As support, petitioners contemplate several hypothetical situations regarding the computation of benefits. *Id.* Petitioners' challenges to the benefits available under the Florida Workers' Compensation Law, however, are not ripe, and therefore are not justiciable.

The doctrine of ripeness prevents courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies. *Abbott Laboratories, et al. v. Gardner*, 387 U.S. 136, 148 (1967). In deciding whether an issue is ripe this Court has traditionally considered two factors: (1) the fitness of the issue for judicial decision; and (2) the hardship to the parties of withholding court consideration. *Id.* at 149. The proceedings below demonstrate that petitioners cannot satisfy either factor.

The JCC denied both petitioners' claims for benefits. (Petitioners' App. M & O). A judicial decision as to which benefits are available under Florida's Workers' Compensation Law and how such benefits are computed would thus have no bearing on either petitioner. Because petitioners are not entitled to benefits here, they cannot be harmed by the Court's failure to evaluate the sufficiency

of benefits. Any injury petitioners might sustain as a result of the allegedly reduced benefits would be speculative; therefore, the petitioners' challenges are premature for review.

Even if petitioners' benefits challenges were ripe, they would still be unsound. In 1993, the Florida Legislature determined that a severe financial crisis that had developed in the workers' compensation insurance industry necessitated significant revisions to the Florida Workers' Compensation Law. Workers' Compensation, ch. 93-415, preamble, 1993 Fla. Sess. Law Serv. 2347, 2351 (West). Many factors contributed to this financial crisis. For example: (1) workers' compensation health care costs were escalating at a far greater rate than the contemporary rate of inflation; (2) Florida employers were paying the second highest overall rates for workers' compensation coverage in the country; (3) the applicable wage loss formula for permanent partial disability benefits created a disincentive to return to work for those employees able to return to the same or similar employment; and (4) permanent total disability benefits were being awarded in Florida at levels more than five times the national average. *Id.*

For these reasons, the legislature took comprehensive action to ensure that the Florida Workers' Compensation Law would continue to meet the public necessity of maintaining a workers' compensation system that provides adequate coverage to injured employees at a cost that is affordable to employers. *Id.* at 2352. Contrary to petitioners' arguments, the 1994 amendments to the Florida Workers' Compensation Law actually did much to facilitate an injured workers' entitlement to benefits.

Post-1994, a workers' compensation claimant seeking permanent total disability benefits was no longer required to establish that he or she was not able uninterruptedly to do even light work available within a one hundred-mile radius of his or her residence. Workers' Compensation, ch. 93-415, § 20, 1993 Fla. Sess. Law Serv. 2347, 2390 (West). Once he or she was assigned a permanent impairment rating, an injured employee was no longer required to show wage loss in order to receive temporary partial or wage loss benefits. *Id.* Instead, the injured employee was assigned benefits at the rate of three weeks for each percentage point of impairment, even if the injured worker was back at work earning full wages. *Id.* at 2392.

Under the post-1994 statute an employee also benefited from the reduction in the amount of time he or she was eligible for temporary total disability (TTD) benefits. The shorter the time period he or she was eligible for TTD benefits, the sooner an injured employee would be eligible for permanent total disability benefits, which was more financially rewarding than temporary total disability benefits. *See generally City of Pensacola Firefighters v. Oswald*, 710 So. 2d 95 (Fla. 1st DCA 1998). Moreover, section 440.134, Florida Statutes, has been created (effective January 1, 1997) to require an employer to furnish to the employee, through managed care arrangements, medically necessary treatment for such period as the injury dictates. Workers' Compensation, ch. 93-415, § 18, 1993 Fla. Sess. Law Serv. 2347, 2385 (West). In several respects, an injured employee can more easily obtain benefits under the Florida Workers' Compensation Law, as amended, in recent years. Petitioners' arguments that the

Florida Workers' Compensation Law has become "an illusory remedy" are thus without merit.

CONCLUSION

Contrary to the requirements of Florida law, Petitioners Bryant and Gunter chose not to request independent medical examinations before trial. (Petitioners' App. M & O). Instead, they chose to seek out unauthorized treatment. *Id.* As a result, the JCC did not allow testimony from the unauthorized physicians, and denied petitioners' claims for benefits under the Florida Workers' Compensation Law. *Id.* Petitioners' constitutional rights have not been abridged in any way. Based on the foregoing arguments and authorities cited above, the Petition for Writ of Certiorari should be denied as to both Petitioners.

Respectfully submitted,

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No. 99-298

In The

SUPREME COURT OF THE UNITED STATES

JEFF BRYANT,

Petitioner,

v.

GOLDEN FLAKE SNACK FOODS, INC. and LIBERTY MUTUAL INSURANCE CO.,

Respondents.

and

WILLIAM GUNTER,

Petitioner,

v.

CITY OF BELLEVIEW and FLORIDA LEAGUE OF CITIES,

Respondents.

On Petition For Writ of Certiorari To
The District Court Of Appeal, First District,
State of Florida

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner Bryant's REPLY TO BRIEF IN OPPOSITION:

I. The Federal Rights Raised Here Are Intertwined With and Identical To State Rights Raised Below.

Respondents GOLDEN FLAKE SNACK FOODS, INC. and LIBERTY MUTUAL INSURANCE COMPANY argue that the federal rights sought to be enforced herein were not addressed by or presented to the state court. (Respondents' Brief at 3). They cite Adams v. Robertson, 117 S.Ct 1028 (1997) for the proposition that this Court will assume the federal issues were not properly presented below if the state court does not address the federal issues. (Respondents' Brief at 4). There then appears to be a conflict in this Court's prior cases. For in Michigan v. Long, 463 U.S. 1032 (1983) this Court stated that when the state and federal law is interwoven, and the face of the state court opinion does not show an independent and adequate state law ground for the decision, this Court will assume the state court felt required to comply with federal law. Id., 1040-1041.

Michigan v. Long was quoted more recently in Ohio v. Robinette, ___U.S.___, 117 S.Ct. 417 (1996). There are also other recent cases holding that when the state constitutional rights are identical to federal constitutional rights, review under 28 U.S.C. § 1257 is proper unless the state court opinion sets out an independent and adequate state law ground for the decision. (Petition at 16-17).

Respondents graciously acknowledged the state and federal constitutional rights are similar. (Respondents' Brief at 4). A close examination reveals they are legally indistinguishable. They are so intertwined that the state court decision would be res judicata to petitioners' federal rights. (Petition at 14-15). It is difficult to reconcile how the state and federal issues may be so intertwined as to constitute res judicata, yet not be sufficiently

intertwined to authorize federal review.

II. The Restriction of Medical Evidence Violates Federal Rights.

A. Due Process of Law...

Respondents argue that due process concerns are less critical in an "administrative setting" than in court. (Respondents' Brief at 7). Yet, they also argue that workers compensation statutes are a substitute remedy for the injured workers' common law tort rights; under the theory that eliminating common law rights is justified by providing a "more certain" administrative remedy. (Respondents' Brief at 9.) However, the very issue raised here is whether the availability of medical testimony is more restricted in the administrative setting than it would be in a court of law. Is it a due process "double whammy?"

B. Redress of Grievances...

Respondents argue that since the workers compensation law does not eliminate the cause of action entirely, it does not run afoul of federal "redress" rights. (Respondents' Brief at 9-10). The very issue raised here is whether the availability of medical testimony is so much under the insurance company's control as to essentially eliminate the very means by which the injured party may petition for relief from the insurance company's decisions about his medical treatment. Has the State of Florida created too steep a tilt in the playing field?

C. Equal Protection of The Laws...

Respondents incorrectly argue that review of these fundamental rights under the equal protection clause should be by the "rational basis" test, rather than the "strict scrutiny" test. (Respondents' Brief at 10-11). They also argue that as long as the entire class of litigants (injured workers) are treated similarly, there is no equal protection problem.

(Respondents' Brief at 10). This once again avoids the real issue. Petitioners do not argue that provision of an administrative remedy for a common law tort right is inherently violative of equal protection principles. The issue raised here is, having selected out a class of litigation to be handled in a separate administrative forum (depriving that class of litigants of access to the court system), is it then permissible to make the admissibility of evidence more restrictive than in the court system (depriving that class of litigants of evidence which would have been available if they had not been deprived of their access to court)? It is doubtful such a statute could survive even under the more relaxed "rational basis" test.

III. Vulnerability Of The Administrative Judges Deprives Parties Of An Independent Adjudicator.

Respondents appear to resort to some sort of "standing" argument by asserting a lack of "...specific proof..." that a particular JCC has lost impartially, and attacking an "...unproven assumption..." that a particular governor is aligned with insurance companies against injured workers. (Respondents' Brief at 13). Of course, the real issue raised here is whether the statute provides the structure for depriving an entire class of litigants of an impartial magistrate, not whether this particular litigant can prove it actually happened to him. See, Petition at i, Questions Presented For Review, paragraph 2.

IV. Petitioner Has Standing To Contest An Illusory Substitute Remedy.

Respondents again appear to resort to attacking petitioner's standing to raise the issue of the illusory remedy by arguing such claims are not ripe. (Respondents' Brief at 14). This argument rests on the concept that petitioner was denied any benefits whatsoever by the JCC, so he lacks standing to raise how such benefits might be calculated. (Respondents'

Brief at 14-15). Of course, respondents do neglect that petitioner has also challenged the very means by which he was denied benefits, en route to his claim the workers compensation system as a whole has become an illusory remedy. (Petition at 7).

Nonetheless, Respondents then proceed with argument which correctly belongs in a brief on the merits, that petitioner's challenge is "unsound" because the Florida Legislature made findings that the insurance industry was in "financial crisis" due to Florida's Workers Compensation system. (Respondents' Brief at 15). In an abundance of caution, petitioner will address this argument, to demonstrate that the findings by the Florida Legislature are hardly dispositive of the issues presented for possible review by this Court.

In NAACP v. Button, 371 U.S. 415 (1963), the state courts made findings that permitting attorneys to address public gatherings for the purpose of informing the general public about their legal rights presented a serious danger of allowing "attorney solicitation," a grievous evil, harmful to the state's citizens. Yet, this Court, looking with a broader perspective, determined that the danger of infringing on First Amendment guarantees outweighed the evil identified in the findings by the state.

In the instant case, the issue is whether this Court should review whether the substitute remedy found appropriate under state law runs afoul of similar federal rights.

Petitioner Gunter's REPLY TO BRIEF IN OPPOSITION:

I. Respondents' Restatement Of The Questions For Review Is Incorrect.

Respondents CITY OF BELLEVIEW, FLORIDA, and FLORIDA LEAGUE OF CITIES listed in their brief "Questions Presented For Review (Restated)." (Respondents' Brief at i). To be sure, the issues listed by respondents do not match the questions presented by petitioner. (Petition at i). Although Respondents may find it advantageous to answer questions they prefer - rather than questions posed by the petitioner - it does not appear Rule 15 of this Court authorizes such a "restatement" of the issues presented.

In one instance, the "restated" question actually changes the constitutional provision against which petitioners requested the Court to measure the state law. Respondents list one of the questions presented as:

> II. WHETHER § 440.45(2), FLA.STAT.(1994) IS AN UNCONSTITUTIONAL VIOLATION OF SEPARATION OF POWERS?

(Respondents' Brief at i). However, petitioner actually presented the question as:

> 2. Whether the unfettered discretion of the Governor to appoint and dismiss administrative judges under Florida's Workers Compensation Law denies the injured worker an independent adjudicator in violation of The due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution and the redress of grievances clause of the First Amendment to the U.S. Constitution?

(Petition at i). A review of respondents' argument on Question 2 reveals that it indeed focuses on separation of powers and not due process, nor equal protection nor redress of grievances. (Respondents' Brief at 7-8.

Accordingly, because respondents failed to address the question actually presented, petitioner prays the Court to strike or ignore all of the argument presented by respondents regarding that "restated" issue.

II. Respondents' Challenge to Federal Jurisdiction Is Inapposite.

Respondents challenge the basis of this Court's jurisdiction under 28 U.S.C. § 1257. (Respondents' Brief at 1). They first assert that the Florida Supreme Court would have jurisdiction (hence Florida's First District Court of Appeal is not the highest state court in which a decision could be had), then assert that the First District Court of Appeal issued no written opinion (hence there is no "decision" for this Court to review). (Respondents' Brief at 1.)

The argument that the Florida Supreme Court would have jurisdiction is rather bizarre. Respondents cite to the Florida Rules of Civil Procedure, rules promulgated by the Florida Supreme Court itself, as the source of its own jurisdiction. (Respondents' Brief at 1.) Of course, the basis of jurisdiction for all Florida Courts is the Florida Constitution.

> The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality. Article V, § 1, Florida Constitution.

The Florida Constitution does give the Florida Supreme Court jurisdiction to issue Prohibition and "all writs." Article V, § 3(b)(7), Florida Constitution. However, this argument is inapposite, as the writ of prohibition serves only to prohibit a lower court from exceeding its lawful jurisdiction (Lamounette v. Akins, 547 So.2d 1001(Fla. 1st DCA 1989)) and the all writs jurisdiction applies only when the Florida

Supreme Court would otherwise have independent jurisdiction under other authority. See, Florida Senate v. Graham, 412 So.2d 360, 361 (Fla. 1982). Neither would confer jurisdiction to review this case on the Florida Supreme Court.

Further, respondents argue that this Court lacks jurisdiction because there was no written "opinion" by the First District Court of Appeal. (Respondents' Brief at 1). Ironically, this contradicts their argument regarding Florida Supreme Court jurisdiction, inasmuch as the Florida Supreme Court has held that it lacks jurisdiction to review a decision without a written opinion.

> This Court does not, however, have subject-matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as opinions issued without opinion or citation. Thus, a district court decision rendered without opinion or citation constitutes a decision from the highest state court empowered to hear the case, and appeal may be taken directly to the United States Supreme Court. (Emphasis added.) The Florida Star v. B.J.F., 530 So.2d 286, 288 n.3 (1988).

Respondents have cited no authority for the proposition that this Court's jurisdiction under 28 U.S.C. § 1257 is limited to cases with a written appellate opinion below.

III. Respondents' Argument Does Not Address The Issue Of An Illusory Substitute Remedy.

As noted above, respondents "restated" the questions presented for review by petitioner. (Supra, at 4-5). For some reason, respondents also chose to renumber the issues presented, so that their argument regarding Question 3 posed by petitioner appears as section 1 of their brief. Compare, Petition at 11-14, Respondents'

Brief at 2-6. Moreover, petitioners argument encompasses several sections of the Florida statute, while respondents' "restatement" focuses only on § 440.15, Florida Statutes. Compare, Petition at 11-13, Respondent's Brief at 2.

The entire thrust of petitioner's argument is summarized in one sentence at the end of that section:

> The remedy available under Florida's Workers Compensation Law is no longer a viable alternative to the common law tort remedy which has been taken away from worker `C'." (Petition at 13.)

Respondents' argument stresses a number of irrelevant points, including whether the Florida Legislature has constitutional authority to even create a workers compensation law (Respondents' Brief at 3) and whether a <u>fair tradeoff</u> of a meaningful administrative remedy for a similar tort remedy is constitutional. (<u>Id.</u>) Only once in five pages of argument do respondents touch upon the issue actually presented by petitioner, and then only to assert:

> As long as the workers' compensation laws remain a reasonable alternative to tort litigation, constitutional rights to equal access, equal protection and due process are not violated. (Cites omitted.) (Respondents' Brief at 5-6).

Agreed! That's exactly the issue for which review is sought. Whether the administrative remedy <u>remains</u> a "reasonable alternative," or has it been gutted, as a taxidermist might gut one of Florida's famous game fish for display; a beautiful, but empty, <u>illusion</u> of what was a living, viable entity.

In a final insult, respondents "restate" (and thereby gut) petitioner's argument by stating,

> Petitioner Gunter's arguments, however, attack the original basis for the creation of workers' compensation laws around the country.... (Emphasis added.) (Respondents' Brief at 6).

While petitioner respects the wide latitude traditionally permitted by this Court for the liberal and full development of ideas and concepts, it is respectfully suggested that respondents have crossed the line, repeatedly "restating" petitioner's actual position right out of the discussion.

IV. Respondents' Argument On Restriction of Medical Testimony Is Misplaced.

As noted above, respondents "restated" the questions presented for review by petitioner. (Supra, at 4-5). Respondents also chose to renumber the issues presented, so that their argument regarding Question 1 posed by petitioner appears as section 3 of their brief. Compare, Petition at 8-9, Respondents' Brief at 8-10.

Respondents appear to raise a "standing" issue by arguing that petitioner failed to comply with the very medical testimony statute which petitioner asserts is unconstitutional. (Respondents' Brief at 9). Of course, if petitioner had complied with the statute, and his proffered medical testimony had been admitted into evidence, respondents would argue that petitioner lacks standing because he suffered no detriment by the statute.

Respondents place reliance on Rucker v. City of Ocala, 684 So.2d 836 (Fla. 1st DCA 1996) to establish that the restriction of medical testimony does not violate petitioner's constitutional rights. (Respondents' Brief at 9-10. Even the hastiest reading of Rucker reveals that the Florida court applied only the loosest standards of the "rational basis" test to this statute. Id., 843. Where the injured worker's constitutional right of access to

courts for redress of grievances is juxtaposed against the profit margins of the insurance industry, it would appear the "strict scrutiny" test should have been applied. See, generally, Romer v. Evans, 517 U.S. 620 (1996), for explanation of equal protection review levels.

Respectfully submitted,

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